(9)

No. 96-1829

In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,

Respondents.

JOINT APPENDIX
VOLUME I, PAGES 1 TO 210

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LIST OF DOCUMENTS CONTAINED IN APPENDIX TO PETITION

The following opinions, orders, pleadings and statutes appear in the Appendix to the Petition for Writ of Certiorari at the indicated pages and therefore have been omitted from the Joint Appendix:

LIST OF DOCUMENTS CONTAINED IN APPENDIX TO PETITION – Continued

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES*

July 13, 1978	Complaint in CV-78-110-BLG (D. Mont.) filed
Sept. 29, 1978	Second amended complaint filed
Oct. 5, 1978	Proposed answer of defendant-intervenor Westmoreland Resources, Inc. to second amended complaint, including counterclaim and crossclaim, filed
Apr. 3, 1979	Memorandum opinion and order granting defendants' motion to dismiss filed
Apr. 4, 1979	Judgment dismissing complaint filed
Apr. 24, 1979	Notice of appeal filed
July 13, 1981	Opinion of Ninth Circuit Court of Appeals in No. 79-4321 reversing district court's judgment filed
Jan. 5, 1982	Order amending opinion in No. 79-4321, denying petition for rehearing, and rejecting suggestion for rehearing en banc filed
June 14, 1982	Order denying petition for writ of certiorari in U.S. Sup. Ct. No. 81-1852 filed
Nov. 22, 1982	Third amended complaint in CV-78-110-BLG filed
Dec. 23, 1982	Answer of defendant-intervenor Westmoreland Resources, Inc. to third amended complaint, counterclaim and crossclaim filed

* The parties have summarized the entries made in the Clerk's Record for the Court's convenience.

Jan. 6, 1983	Order filed granting plaintiff preliminary injunction against enforcement of severance tax with respect to defendant-intervenor Westmoreland Resources, Inc. and directing Westmoreland to make future severance tax payments into court registry
June 6, 1983	Complaint of plaintiff-intervenor United States filed
Jan. 6, 1984	Final pretrial order filed
May 25, 1984	Order denying plaintiff's preliminary injunction against enforcement of gross proceeds tax filed
June 22, 1984	Memorandum opinion regarding denial of plaintiff's preliminary injunction against enforcement of gross proceeds tax filed
Sept. 10, 1985	Findings of fact, conclusions of law and order directing entry of judgment in defendants' favor filed
Sept. 11, 1985	Judgment filed
Sept. 25, 1985	Motion of defendant State of Montana for release of deposited severance tax payments filed
Sept. 25, 1985	Motion of plaintiff-intervenor United States for rehearing and to alter or amend judgment filed
Mar. 12, 1986	Order filed denying defendant State of Montana's motion for release of deposited funds and plaintiff-intervenor United States' motion for rehearing and to alter or amend judgment

May 6, 1986	Notice of appeal by plaintiff-intervenor United States filed
May 7, 1986	Notice of appeal by plaintiff filed
June 11, 1987	Opinion of Ninth Circuit Court of Appeals in Nos. 86-3842 and 86-3845 filed
Nov. 25, 1987	Order in CV-78-110-BLG granting motion of defendant-intervenor Westmoreland Resources for leave to make gross proceeds tax payments into Court Registry and for protection against adverse claims filed
Dec. 2, 1987	Memorandum opinion and order in CV-78-110-BLG providing for payment of gross proceeds tax payments into Court Registry and for protection against adverse claims filed
Jan. 11, 1988	Order in U.S. Sup. Ct. No. 87-343 affirming judgment of Ninth Circuit Court of Appeals in Nos. 86-3842 and 86-3845 filed
June 9, 1988	Memorandum opinion and order in No. CV-78-110-BLG denying motion of Westmoreland's utility customers for leave to intervene filed
July 11, 1988	Memorandum opinion and order denying Westmoreland's motion to amend its answer opposing plaintiff's motion for release of funds in Court Registry filed
Sept. 19, 1988	Judgment awarding funds in court registry to United States in trust for Crow Tribe filed

Oct. 11, 1989	Fourth amended complaint for restitution filed
Dec. 26, 1990	Memorandum opinion and order denying defendants' motion to dismiss fourth amended complaint filed
Dec. 26, 1990	First amended complaint of plaintiff-intervenor United States filed
May 29, 1991	Opinion and order of certification for interlocutory appeal under 28 U.S.C. § 1292(b) filed
July 17, 1991	Order by Ninth Circuit Court of Appeals in No. 91-35682 granting permission to appeal under 28 U.S.C. § 1292(b) filed
July 23, 1992	Order dismissing appeal in No. 91-35682 filed
Oct. 22, 1993	Stipulation and order in CV-78-110-BLG dismissing defendant-intervenor Westmoreland Resources, Inc.'s crossclaim and counterclaim and dismissing Westmoreland as party filed
Apr. 18, 1994	Amended final pretrial order filed
Nov. 23, 1994	Findings of fact, conclusions of law, order directing judgment in defendants' favor, and judgment filed
Jan. 19, 1995	Notice of appeal by plaintiff filed
Jan. 19, 1995	Notice of appeal by plaintiff-intervenor United States filed
June 12, 1995	Order by Ninth Circuit Court of Appeals granting motion of appellees to consolidate appeals in Nos. 95-35093 and 95-35096 filed

Aug. 6, 1996	Opinion of Ninth Circuit Court of Appeals reversing District Court's judgment filed
Sept. 18, 1996	Petition for rehearing with suggestion for rehearing en banc of appellees received
Sept. 20, 1996	Petition for rehearing of appellant Crow Tribe received
Oct. 29, 1996	Order recalling mandate filed, accepting for filing appellees' petition for rehearing received on September 18, 1996, and amending opinion
Nov. 21, 1996	Order denying petition for rehearing of appellant Crow Tribe filed
Feb. 21, 1997	Order denying petition for rehearing and rejecting suggestion for rehearing en banc of appellees filed

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

CONTRACT NO. 1420-0252-4088
(Tract 3, Sale 3)

AMENDED
COAL MINING LEASE INDIAN LANDS

Coal Mining Lease Crow Reservation.

THIS INDENTURE OF LEASE is made and entered into on this 26th day of November, 1974 between the CROW TRIBE OF INDIANS OF THE CROW RESERVATION, of Crow Agency, State of Montana, Party of the First Part, hereinafter called Lessor, and WESTMORELAND RESOURCES, a partnership, of Billings, Montana, Party of the Second Part, hereinafter called Lessee, for the purpose of amending that certain Coal Mining Lease Indian Lands entered into between the parties on June 6, 1972. This lease shall have the effect of ratifying the June 6, 1972, lease and in addition amending the same in its entirety to read as follows.

WITNESSETH:

I. Lessor, in consideration of $1.00, receipt of which is hereby acknowledged, of the rent and royalty to be paid, and of the agreement of the lessee herein contained, as well as execution by the parties of the Settlement Agreement attached hereto as Exhibit "B" and made a part hereof and execution by the parties of the Land Purchase Agreement attached hereto as Exhibit "C" and made a part hereof, grants and leases unto lessee for the

sole purpose of mining coal on the land described as follows:

> See Exhibit "A" attached hereto and by this reference made a part hereof.

Crow Reservation, Big Horn County, State of Montana, and containing 14,745.92 acres, more or less. The lessee may occupy as much of the surface of the land as is necessary to carry on the work of exploring for, developing, mining, producing, processing, marketing and removing said coal, including milling and storing subject to payments to be made as hereinafter set forth. Subject to the limitations hereinafter provided, with particular reference to the provisions contained in paragraph 6 f. of this lease, lessee shall have the right and license in connection with the operation of mining on the lands to construct thereon buildings, pipelines, plants, tanks, and other structures used or useful in the production, processing, and transportation of said coal; make excavations, openings, stockpiles, dumps, ditches, drains, roads, railroads, spur tracks, transmission lines, and other improvements used or useful in said production, processing, and transportation; produce electrical power for its own use, erect and operate pipelines, place machinery and other equipment and fixtures upon the lands; use and transport water developed by lessee on the lands and any other water made available to lessee; prepare for market, remove, process, and sell coal; do all other things upon said leased premises that may be necessary in the efficient operation of the leased premises for the purposes permitted hereunder, and occupy so much of the surface of the leased lands as may be necessary to carry on the mining operations hereunder, including the right

of ingress and egress; however, the rights contained herein do not include the right to dump waste materials or tailings from properties not included in this lease.

II. TERM. This lease is for a term of 10 years from June 14, 1972, and as long thereafter as coal is produced in paying quantities.

III. Definition. Secretary refers to the Secretary of the Interior or his authorized representative. Area Director refers to the official in charge of the Billings Area Office, Billings, Montana. Superintendent refers to the official in charge of the Crow Indian Agency, Crow Agency, Montana. Supervisor refers to the Regional Mining Supervisor, U. S. Geological Survey.

IN CONSIDERATION OF THE FOREGOING, THE LESSEE AGREES:

1. ROYALTY.

a. *General Royalty Provisions.* For purposes of this Section 1, ROYALTY, the coal in and under the leased premises is divided into portions.

I. The first portion is 77 million tons of coal which the lessee has agreed to sell to Northern States Power Company, Dairyland Power Cooperative, Interstate Power Company, and Wisconsin Power & Light Company pursuant to coal sales agreements dated June 15, 1972.

The lessee will pay a royalty to the Superintendent, for the use and benefit of the lessor, on or before the twenty-fifth day of each calendar month during the term hereof on all such coal mined and shipped from the leased premises during the preceding calendar month. The amount of such royalty shall be as follows:

(a) For coal mined and shipped during the calendar years 1974 and 1975, the greater of either 25¢ per ton for each ton of 2,000 pounds of coal or an amount per ton for each ton of 2,000 pounds of coal equal to 6% of the F.O.B. mine price per ton;

(b) For coal mined and shipped during the calendar years 1976 and 1977, the greater of either 30¢ per ton for each ton of 2,000 pounds of coal or an amount per ton for each ton of 2,000 pounds of coal equal to 6% of the F.O.B. mine price per ton; and

(c) For coal mined and shipped during the calendar year 1978 and all years thereafter, the greater of either 35¢ per ton for each ton of 2,000 pounds of coal or an amount per ton for each ton of 2,000 pounds of coal equal to 6% of the F.O.B. mine price per ton.

II. The second portion of coal is the balance of the coal covered by this lease. The lessee will pay a royalty to the Superintendent, for the use and benefit of the lessor, on or before the twenty-fifth day of each calendar month during the term hereof on all such coal mined and shipped from the leased premises during the preceding calendar month. The amount of such royalty shall be the greater of either 40¢ per ton for each ton of 2,000 pounds of coal or an amount per ton for each ton of 2,000 pounds of coal equal to 8% of the F.O.B. mine price per ton.

b. *Renegotiation of Royalty.* The royalty rate provided for in subparagraph 1 a. II of this lease shall become subject to renegotiation every ten years beginning ten years after the date hereof. Negotiations shall commence not less than 120 days prior to the end of each

such ten year period. Both parties shall negotiate in good faith and neither party shall utilize such renegotiations to attempt to terminate this lease. Neither party shall request a royalty rate clearly above or below the rate then being paid and received for coal of like grade, quality and approximate quantity mined in Montana, North Dakota and Wyoming. If an agreement on royalty has not been reached on or before the beginning of any ten year period, the dispute shall be submitted to arbitration as provided in paragraph 29 of this lease, and the decision of the arbitrators shall be final and binding on the parties and retroactive to the first day of the new ten year period.

c. *Additional Bonus and Advance Royalty.* Following execution by both parties of this lease and all attached Agreements and approval of this lease and the attached Agreements by the Secretary of the Interior the lessee shall immediately pay to the Superintendent for the use and benefit of the lessor the sum of $1,128,000.00. $500,000.00 of the foregoing amount shall be treated as bonus and shall not be recoverable by the lessee. $628,000.00 of the foregoing amount shall be treated as an advance royalty and may be recovered by the lessee by crediting the sum of $8,333.33 to the production royalties payable by the lessee in January of 1985 and each calendar month thereafter until the entire $628,000.00, without interest, has been recovered by the lessee.

d. *Advance Minimum Royalty.* The lessee will pay, or cause to be paid to the Superintendent, Crow Indian Reservation, Crow Agency, Montana, for the use and benefit of the lessor on June 14, 1975, an advance minimum royalty of $2.00 per acre per year and on June 14, 1976, and each June 14 thereafter until the end of the

development period as defined in paragraph 5 of this lease an advance minimum royalty of $5.00 per acre per year. The advance minimum royalty paid pursuant to this subparagraph will apply as a credit only against production royalties payable on account of coal mined and shipped from the leased premises during the twelve month period immediately following the date of payment of such advance minimum royalty.

e. *Protection of Royalty Where There is Captive Coal.* Where coal is mined from the leased premises and is not sold or shipped, but is consumed by the lessee, the lessee shall pay the greater of either 40¢ per ton for each ton of 2,000 pounds of coal mined, or an amount per ton for each ton of 2,000 pounds of coal equal to 8% of the F.O.B. mine price per ton. For purposes of computing the percentage royalty under these circumstances or under those circumstances where the coal is not sold pursuant to an arms length sales contract, the lessor and the lessee shall agree on the basis for constructing the F.O.B. mine price of such coal. If the parties fail to agree, then either party may demand that the matter be submitted to arbitration in the manner provided in subparagraph 29 of this lease.

f. *Protection of Royalty for Commingled Coal.* The lessee shall have the right to commingle coal mined under this lease with other coal, and the lessee shall determine at the end of each calendar month by survey the volume of coal mined from the leased premises and from other sources. For purposes of calculating royalty, the tonnage mined and shipped from the leased premises shall be determined by applying to the total coal mined and shipped from the mine that percentage of the total

volume, determined by survey, to have been removed from the leased premises.

g. *Measure of Quantity for Royalty Payment.* The quantity of all coal mined by the lessee shall be determined by railroad or truck scales, belt weightometers, or other means mutually agreed upon.

h. *Protection of Royalty Through Submission of Records.* The lessee will perform such work on said premises as may be necessary to establish boundaries and control, and will keep or cause to be kept at the mine up-to-date, clear, accurate and detailed maps or drawings of workings made by the lessee, which maps and drawings shall be available for inspection by the lessor at all reasonable times. Copies or reproductions of current maps and drawings of the leased premises as aforementioned shall be furnished to the lessor semi-annually. The lessee will also furnish to the lessor copies of all drill hole records, including logs of the holes, and analyses of any samples taken.

2. ANNUAL RENTAL. To pay, or cause to be paid to the Superintendent for the use and benefit of the lessor, an advance annual rental of $1.00 per acre beginning on the approval date of this lease and continuing for so long as this lease is in force and effect. The annual rental payment should be received on, or PRIOR to, each anniversary date of this lease. The rent is not to be credited on the royalties accruing to the lessor under this lease. if the lease is surrendered or cancelled, no rent accruing to the lessor will be refunded.

3. DILIGENCE, PREVENTION OF WASTE. To exercise diligence in the conduct of prospecting and mining

operations, to carry on development and operations in a workmanlike manner and to the fullest possible extent; to neither commit nor suffer waste to be committed upon the land leased; to comply with the applicable laws of the state in which the land is located; to take appropriate steps to preserve the property and provide for the health and safety of workmen; to surrender and return promptly the premises upon the termination of this lease to whoever is lawfully entitled thereto, in as good condition as received, except for the ordinary wear and tear and unavoidable accidents in the proper use of the premises. If the payments agreed upon in this lease have been made and the other lease terms and applicable regulations have been complied with, the office fixtures and records, personal property, tools, pumping and drilling equipment, boilers, engines, and mining machinery and all other personal property and improvements on the leased premises (except the lessor's property) may be removed by the lessee as soon as practicable after the lease expires by forfeiture or otherwise.

4. INITIAL MINIMUM PRODUCTION REQUIREMENTS.

a. *Lessee's Obligation to Produce Coal at an Annual Rate of 10,000,000 Tons Per Year or Pay Minimum Royalties.* The lessee shall mine and ship coal from the leased premises at the rate of 10,000,000 tons per year on or before June of 1982 as provided in this paragraph. If, prior to July 1982, lessee has not mined and shipped 5,000,000 tons of coal (hereinafter referred to as the "initial required amount") from the leased premises during any half-year (which shall mean any six month period, as extended by periods of force majeure, beginning on July 1

or January 1) then for each calendar month during the period beginning on July 1, 1982, and continuing until the end of any half-year during which the lessee does mine and ship the required amount of coal from the leased premises, the lessee shall pay to the Superintendent for the use and benefit of the lessor on or before the 25th day of the succeeding calendar month (in addition to production royalties required to be paid hereunder) a minimum royalty equal to one-half of the difference between the production royalty actually paid by lessee during such month and the production royalty which would have been payable by the lessee during such month had the lessee mined and shipped 833,333.33 tons of coal (hereinafter referred to as the "initial required rate") from the leased premises during such calendar month at the prevailing royalty rate. The lessee's obligation to pay minimum royalty as provided above shall cease after it has mined and shipped the initial required amount of coal from the leased premises during any half-year. If, however, lessee does not mine and ship the initial required amount of coal from the leased premises during any half-year after July 1, 1982, then, as of the end of such half-year, lessee's obligation to pay minimum royalties for any calendar month during which it does not mine and ship coal at the required rate shall be revived and shall continue until the lessee has again mined and shipped the required amount of coal from the leased premises during any half-year. Lessee's obligation to pay minimum royalties thereafter may revive and cease again from time to time, as provided in this paragraph. As used in this lease the term "prevailing royalty rate" shall mean the weighted average per ton royalty actually paid by the

lessee on account of all coal mined and shipped from the leased premises during the preceding twelve month period.

b. *Lessee's Right to Avoid Payment of Minimum Royalties by Terminating a Portion of this Lease.* The lessee may avoid paying the minimum royalties required by paragraph 4 a. above by selecting a portion or portions of the leased premises reasonably estimated by it to contain a maximum of 500,000,000 tons of economically mineable coal in place less all coal previously mined and shipped from the leased premises, and then terminating this lease as provided in paragraph 16 as to any portion of the leased premises not so selected. In making its selection, the lessee shall exercise reasonable efforts to assure that the portion or portions of the leased premises selected are situated so as to allow economic mining of the coal, if any, within the portion of the leased premises with regard to which this lease is terminated. The lessee may make its selection at any time prior to the end of the development period as defined in paragraph 5 of this lease, and the lessee's obligation to pay minimum royalties under subparagraph 4 a. above shall cease as of the first day of the month next following 60 days after the lessee has made its selection and notified lessor thereof. If the lessee makes a selection and terminates its lease as to a portion of the leased premises, as provided in this paragraph, then the lessee's obligations in paragraph 5 shall terminate and that paragraph shall be of no further force or effect.

c. *Lessee's Right to Recover Minimum Royalties Paid.* All minimum royalties paid by the lessee pursuant to this paragraph may be recovered by the lessee by

applying the same as a credit against one-half of the first production royalties payable by the lessee after the lessee has mined and shipped the required amount of coal from the leased premises during any half-year without regard, however, to the time at which such minimum royalties were paid or the time at which such production royalties are payable.

d. *Cessation of Lessee's Obligations Under this Paragraph.* Lessee's obligations under this paragraph shall cease at the end of the development period as defined in paragraph 5 of this lease.

e. *Arbitration.* All disputes between the parties concerning the subject matter of this paragraph shall be submitted to arbitration as provided in paragraph 29 of this lease and the decision of the arbitrators shall be final and binding on the parties.

5. FINAL MINIMUM PRODUCTION REQUIREMENTS.

a. *Lessee's Obligation to Produce Coal at an Annual Rate of 15,000,000 Tons Per Year or Pay Minimum Royalties.* The lessee shall mine and ship coal from the leased premises at the rate of 15,000,000 tons per year on or before the end of the development period as provided in this paragraph. If, prior to the end of the development period, as defined below, lessee has not mined the shipped 7.5 million tons of coal (hereinafter referred to as the "final required amount ") from the leased premises in any half-year (which shall mean any six month period, as extended by periods of force majeure, beginning on July 1 or January 1), then for each calendar month during the period beginning at the end of the development period

and continuing until the end of any half-year during which the lessee does mine and ship the required amount of coal from the leased premises, the lessee shall pay to the Superintendent for the use and benefit of the lessor on or before the 25th day of the succeeding calendar month (in addition to production royalties required to be paid hereunder) a minimum royalty equal to one-half of the difference between the production royalty actually paid by the lessee during such month and the production royalty which would have been paid by the lessee during such month had the lessee mined and shipped 1,250,000 tons of coal (hereinafter referred to as the "final required rate") from the leased premises during such calendar month at the prevailing royalty rate. As used in this lease the term "development period" shall mean a period of eight years beginning on the earlier of December 1, 1981, or the date that Colorado Interstate Gas Company (CIG) exercises, terminates or allows to expire an option granted to it pursuant to an option agreement between CIG and the lessee dated December 1, 1971. The development period will be increased by six months for each year prior to 1982 in which CIG exercises, terminates or allows its option to expire. In no event, however, will the development period extend beyond the date upon which it is determined that lessee has failed, during such development period, to undertake in good faith all steps as are reasonably necessary in its judgment to permit it to mine and ship coal from the leased premises at the final required rate on or before the end of the development period. The lessee's obligation to pay minimum royalties, as provided above, shall cease after it has mined and shipped the final required amount of coal from the leased

premises during any half-year period. If, however, the lessee does not mine and ship the final required amount of coal from the leased premises during any half-year after the development period then lessee's obligation to pay minimum royalties for any month during which it does not mine and ship coal at the required rate shall be revived and shall continue until the lessee has again mined and shipped the required amount of coal from the leased premises during any half-year period. Lessee's obligation to pay minimum royalties thereafter may revive and cease again from time to time as provided in this paragraph but in no event shall it revive because of lessee's failure to mine and ship the required amount of coal from the leased premises during any half-year ending ten years after the end of the development period.

b. *Lessee's Right to Avoid Payment of Minimum Royalties by Terminating a Portion of this Lease.* Lessee may avoid paying the minimum royalties required by subparagraph 5 a. above by selecting the larger of the portions of the leased premises described below and then terminating this lease as to the balance of the leased premises as provided in paragraph 16. Such portions shall be (i) that portion or portions of the leased premises necessary to support operations at the annual productive capacity of the mining equipment and/or facility which is then permanently dedicated to the leased premises times thirty years (which thirty year period may be extended by an extension of the useful life of such mining equipment and/or facility caused by repair or replacement of, or addition to the same) less that portion of the leased premises from which coal has been previously mined provided, however, that this subparagraph 5 b. (i) shall

not be effective if the annual productive capacity of the mining facility and/or plan permanently dedicated to the leased premises at the date of the lessee's selection is not at least 13.5 million tons; or (ii) that portion or portions of the leased premises necessary to satisfy all existing agreements for the delivery of coal (which call for delivery of coal to commence within thirty months after the date of selection) and related mining plans; or (iii) that portion or portions of the leased premises reasonably estimated by the lessee to contain a maximum of 500,000,000 tons of economically mineable coal in place less all coal previously mined and shipped from the leased premises. In making its selection the lessee shall exercise reasonable efforts to assure that the portion or portions of the leased premises selected are situated so as to allow economic mining of the coal, if any, within the portion of the leased premises with regard to which this lease is terminated. The lessee may make its selection at any time during the term of this lease, and the lessee's obligation to pay minimum royalties under paragraph 5 a. above shall cease as of the 1st day of the next month following sixty days after the lessee has made its selection and notified the lessor thereof.

c. *Lessee's Right to Recover Minimum Royalties Paid.* All minimum royalties paid by the lessee pursuant to this paragraph may be recovered by the lessee by applying the same as a credit against one-half of the first production royalties payable by the lessee after the lessee has mined and shipped the final required amount of coal from the leased premises during any half-year without regard, however, to the time at which such minimum

royalties were paid or the time at which such production royalties are payable.

d. *Arbitration*. Any dispute between the parties concerning the subject matter of this paragraph shall be submitted to arbitration as provided in paragraph 29 of this lease and the decision of the arbitrators shall be final and binding on the parties.

6. PROTECTION OF ENVIRONMENT AND RESTORATION OF SURFACE. The lessee agrees to preserve and protect the natural environmental conditions on the land encompassed by its lease, or land affected by its exploration or mining operations, and to take such corrective actions as may be necessary within the scope of normal soil conservation and antistream and antiair pollution practices, as follows:

a. Conduct operations so as not to pollute any surface or subsurface fresh water supply.

b. Control water supplies in conformity with existing laws and tribal ordinances and in all cases hold erosion and flood damage to a minimum.

c. Terrace and landscape waste disposal areas in a reasonable manner at its own cost and expense. The landscaping shall include, but is not limited to, the planting of grasses, shrubs, and other vegetation which will partially screen the area from view and control water and wind erosion. The surface of any waste dumps shall be left reasonably flat, and tailings will be covered with soil to a depth that will permit the early establishment and propagation of vegetation upon the completion of use of

the leased premises or said waste or tailings dumps or deposits.

d. Conduct operations that will minimize air pollution which may result from stripping, mining, milling, hauling, leaching, or waste disposal, in conformity with existing or future laws or tribal laws or tribal ordinances enacted applicable to air pollution control.

e. As soon as practicable after the issuance of the lease, and before the commencement of any surface-disturbing activities, the lessee shall submit a plan of implementation which shall indicate how the previously-agreed-to stipulations of environmental preservation and surface reclamation will be carried out. The plan of implementation shall be in conformance with 25 CFR 177.7 and shall be submitted to the Regional Mining Supervisor, U.S. Geological Survey, and Superintendent for approval.

f. Lessee will not sell coal mined from the leased premises for use in a coal conversion or mine mouth generating facility to be located on the Crow Indian Reservation or within 50 miles of the exterior boundaries of the diminished Crow Indian Reservation without first receiving approval of such sale from the lessor. This limitation on the lessee's right to sell coal shall not apply to any coal sold to or mined by or for Colorado Interstate Gas Company (CIG) pursuant to an option agreement between CIG and the lessee dated December 1, 1971, but the lessor and lessee will use their best good faith efforts to obtain an agreement from CIG to the effect that CIG will seek the Crow Indian Tribe's approval of construction or operation by it of any coal

conversion or mine mouth generating facility located within 50 miles of the exterior boundaries of the diminished Crow Indian Reservation and which will use coal mined from the leased premises.

7. FOREST PROTECTION. The lessee agrees:

a. not to cut, destroy, or damage timber without prior authority of the Commissioner of Indian Affairs or his authorized representative, such authorization to be made only where required by the pursuance of necessary mining operations.

b. To pay for all such timber cut, destroyed, or damaged at rates prescribed by the Commissioner of Indian Affairs or his authorized representative, such rates to be determined on the basis of sales of similar timber in the vicinity.

c. Not to interfere with the sale or removal of timber from the land covered by this lease by contractors operating under an approved timber sales contract now in effect or which may be entered into during the period of this lease.

d. To do all in its power to prevent and suppress forest, brush, or grass fires on the leased land and in its vicinity, and to require its employees, contractors, subcontractors, and employees of contractors or subcontractors to do likewise. To place its employees, contractors, subcontractors, and the employees of such contractors or subcontractors employed on the leased land at the disposal of any authorized officer of the Indian Service for the purpose of suppressing forest, brush, or grass fires with the understanding that the

payment for such services shall be made at rates to be determined by the Commissioner of Indian Affairs or his authorized representative, which rates shall not be less than the rates of pay prevailing in the vicinity for services of similar character; PROVIDED, That no payment shall be made for services rendered in the suppression of fires for which the lessee, its employees, contractors, or subcontractors, or the employees of such contractors or subcontractors are responsible.

e. To pay for the loss of all timber 10 inches or more in diameter occasioned by fires for which it, or any of its employees, contractors, subcontractors, or the employees of such contractors or subcontractors are responsible for the start or spread, the assessment of the value of such damages to be determined by the Commissioner of Indian Affairs or his authorized representative on the basis of the value of such timber on sales of similar timber in the vicinity. Also, to pay liquidated damages of $25 per acre for all young timber less than 10 inches in diameter destroyed by such fires and to pay all costs for the suppression of fires for which it, or any of its employees, contractors, or subcontractors, or the employees of such contractors, [sic] or subcontractors are responsible.

f. Not to burn rubbish, trash, or other inflammable materials except with the consent of the authorized representative of the Commissioner of Indian Affairs, and not to use explosives in such manner as to scatter inflammable materials on the surface of the land during the fire season, except as authorized to do so by such representative.

8. DEVELOPMENT. The land described herein shall not be held by the lessee for speculative purposes, but for mining coal. Within 20 days after the anniversary date of the lease, the lessee shall file with the Superintendent an itemized statement, in duplicate, of the amount and character of the previous year's expenditures incurred in actual mining operations and development and in the construction of improvements on or for the benefit of the leased land. The statement must be certified under oath by the lessee or its agent. With respect to reports to be rendered direct to the Regional Mining Supervisor, U.S. Geological Survey, and matters concerning operating and safety regulations, the lessee shall observe the requirements of Title 30 of the Code of Federal Regulations, Part 211 (cited in paragraph 10 of this lease). If the lessee fails in the diligent development and continued prospecting and exploration work or operation of the mine, except as provided in section 28 of this lease, this lease will be subject to cancellation. Whenever the Secretary of the Interior, or his authorized representative, considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may authorize the suspension of operations for such time as he considers advisable, but this does not release the lessee from paying the advance annual rental. Payment of minimum royalty will not excuse complying with the provisions of this section, except as expressly provided in paragraphs 4 and 5 of this lease.

9. MONTHLY STATEMENTS. To keep an accurate record of the mining operations, showing the sales, prices, dates, purchasers, and the amount of coal mined, the amount of coal removed, and the gross receipts, and

to furnish the Superintendent sworn monthly reports before the 25th of the succeeding month. All royalty and advance rental due shall be a lien on all implements, tools, movable machinery, and all other chattels used in the operation and upon all of the unsold coal obtained under the lease. An audit of the accounts and books of the lessee shall be made annually or at any other time directed by the Superintendent by a certified public accountant approved by the Secretary of the Interior and at the expense of the lessee. The lessee shall furnish, through the Superintendent, a free copy of the audit to the Secretary of the Interior within 30 days after the completion of each audit.

10. REGULATIONS. To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases including, but not limited to, 25 CFR 171, 177, and 30 CFR 211. Rate of royalty, the annual rental, or the terms of the lease may not be changed by a future regulation without the written consent of the parties to this lease.

11. ASSIGNMENT OF LEASE. Not to assign this lease or any interest therein by an operating agreement including agreements providing for payment of overriding royalty or otherwise, nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.

12. BOND. To furnish to the Superintendent an acceptable surety bond as provided in 25 CFR 171.6 or 177.8. The right is reserved to the Secretary of the Interior or his authorized representative to increase the amount of bond.

13. UNLAWFUL CONDUCT. The lessee further agrees that it will not willfully use or permit to be used any part of said premises for any unlawful conduct or purpose whatsoever; and that any violation of this clause by the lessee or with its knowledge, shall render this lease voidable at the option of the Superintendent.

14. INSPECTION. The leased premises, producing operations, appurtenances, and all books and accounts of the lessee may be inspected by the lessor and its agents or any authorized representative of the Secretary of the Interior.

15. DISPOSITION OF MINERALS AND SURFACE. The lessor expressly reserves the right to lease, sell, or otherwise dispose of the oil, gas, sand, gravel, building stone, and the surface of the lands in this lease under existing law or laws hereafter enacted, such disposition to be subject to the right of the lessee to use as much of the surface as is necessary in the extraction and removal of the minerals from the leased land.

16. SURRENDER AND TERMINATION. The lessee may at any time terminate this lease or any part thereof upon the payment of all rentals, royalties, and other obligations due to the lessor and a surrender fee of $5 and upon written notice being given 60 days in advance to the lessor through the Crow Tribal Council and the Secretary of the Interior. In the event restrictions have not

been removed, the lessee shall submit a showing satisfactory to the lessor through the Crow Tribal Council and to the Secretary of the Interior or his authorized representative that full provision has been made for the conservation and protection of the property. The lease shall continue in full force and effect as to the lands not so surrendered. If this lease or any assignment thereof has been recorded, the lessee or assignee shall file a recorded release with its application to the Superintendent for termination of this lease.

17. RELINQUISHMENT OF SUPERVISION BY THE SECRETARY OF THE INTERIOR. Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage covered hereby, the relinquishment will not bind the lessee until the Secretary has given 30 days' written notice. Until all the requirements for relinquishment are fulfilled, lessee shall continue to make all payments due under subsections 1, 2, 4 and 5. After notice of relinquishment has been received by lessee, this lease is subject to the following further conditions:

a. All rentals and royalties accruing shall be paid directly to lessor or its successors in title.

b. If at the time supervision is relinquished by the Secretary of the Interior as to all lands under this lease, and lessee has made all payments due under the lease and has fully performed all obligations on its part to be performed up to the time of such relinquishment, the bond given to secure the performance of the lease and on file in the Indian Office shall be of no further force or effect.

18. WATER WELLS. The lessee may, at its own expense, drill and equip water wells on the leased premises and agrees that all wells will be left intact and properly cased at the termination of the lease by expiration of its own term or otherwise. Lessee shall have the right to remove all mechanical pumping equipment installed by it at any well.

19. DAMAGES. The lessee shall conduct all operations authorized in this lease with due regard to preventing unnecessary damages to vegetation, timber, soil, roads, bridges, cattle guards, fences, and other improvements, including construction, operation, or maintenance of any of the facilities on or connected with this lease which causes damage to the watershed or pollution of the water resources. On termination of operations under this lease, the lessee shall make provisions for the conservation, repair, and protection of the property and leave all the areas on which the lessee has worked in a condition that will not be hazardous to life or limb, and will be to the satisfaction of the Superintendent.

20. LIABILITY FOR DAMAGE. The lessee is liable for any and all damages resulting from its operations under this lease, including injury to the lessor, and for any and all damage to, or destruction of, all property, caused by the lessee's operations hereunder. The lessee agrees to save and hold the lessor and the United States, its employees and licensees, harmless from all suits for injury or claims for damages to persons and property resulting from the lessee's operations under this lease.

21. ROADS. The lessee may use existing roads, if any, on the land and may construct, and maintain, at its

own expense, any additional roads across lessor's lands that are necessary in carrying on the actual mining, prospecting, and exploration work after the location of these roads has been approved in writing by the Superintendent of the Crow Indian Agency. The public obtains no rights to these roads, and upon termination of this lease or if at any time it becomes unnecessary for lessee to use the road for conducting the operations authorized under this lease, the right to use the road shall thereupon cease and all the rights shall revest in lessor in accordance with law. The lessee shall hold the lessor and the United States harmless and indemnify them against any loss or damage that might result from the negligent construction or maintenance by lessee of the road.

22. INDIAN LABOR. The lessee shall give a priority right of employment to members of the Crow Tribe for all positions for which they are qualified and available and shall pay the prevailing wage rates for similar services in the area. Upon initial hiring and whenever thereafter a job opening occurs, the lessee, its contractors or subcontractors, shall give notice of such opening to the Crow Tribe stating the time and place where job applications will be accepted. Except in cases of emergency, no nonmember of the Tribe shall be hired for any job until at least 48 hours (not including Saturdays and Sundays) following the delivery of such notice to the Crow Tribe. The terms of this paragraph may be amended by subsequent agreement of the parties to this lease.

23. INSURANCE, SOCIAL SECURITY, TAXES, ETC. The lessee agrees to carry such insurance covering all persons working in, on, or in connection with the leased premises for the lessee as will fully comply with the

provisions of the statutes of the State of Montana covering workmen's compensation and occupational disease, as are now in force or as may be amended. Further, the lessee agrees to comply with all the terms and provisions of all applicable laws of the state of Montana and of the United States of America as now exist or as may be amended, pertaining to Social Security, unemployment compensation, wages, hours, and conditions of labor; and to indemnify and hold the lessor and the United States harmless from payment of any damages occasioned by the lessee's failure to comply with these laws. The lessee shall pay all taxes lawfully levied or assessed on the sale, severance, production, extraction, or removal of the coal covered by this lease.

24. HEIRS AND SUCCESSORS IN INTEREST. It is further covenanted and agreed that each obligation under this lease shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the parties to this lease.

25. GOVERNMENT EMPLOYEES CANNOT ACQUIRE LEASE. No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Department of the Interior shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

26. CANCELLATION AND FORFEITURE. When, in the opinion of the Secretary, the lessee has violated any of

the terms and conditions of the lease or of the applicable regulations, the lessee shall be served with a written notice setting forth the alleged violations and allowing him 30 days from the date of said notice to show cause why the lease should not be cancelled. If it is determined that the violation may be corrected and the lessee agrees to take the necessary corrective actions, he may be given a reasonable period of time (which, with regard to any payment of money due under this lease shall not be more than 60 days) to carry out such measures, or he may request a hearing within the 30 days after the date of the notice. If it is determined, following the hearing, that the violation may be corrected, and the lessee agrees to take the necessary corrective action, the Secretary may permit the lessee to take such corrective action, in which case he will establish a reasonable period of time (which, with regard to any payment of money due under this lease shall not be more than 60 days) to carry out such measures. The time granted for correcting violations shall not serve to extend or continue tribal leases beyond the primary term. If the lessee fails to show cause why the lease should not be cancelled or fails to take corrective measures to cure the default within the specified period of time granted, the Secretary shall serve written notice to the lessee that the lease is null and void, and the lessor shall then be entitled and authorized to take immediate possession of the premises.

27. PRESERVATION OF ANTIQUITIES. It will be the responsibility of the lessee to obtain necessary archaeological clearances in accordance with the Antiquities Act of 1906, prior to the start of any mining operations whatsoever.

28. FORCE MAJEURE. If, because of force majeure, the lessee is reasonably prevented from performing any of its obligations under this lease or satisfying any of the conditions of this lease, including those obligations and conditions which if unfulfilled may limit the term of the lease or entitle the lessor to receive minimum royalties, then such obligations and conditions shall be reduced, and any time, date or production requirements or limitations (including those on the term of this lease if production of coal in paying quantities is interrupted by such force majeure), shall be extended or reduced to the extent the lessee is so prevented. As used herein, "force majeure" means any act or occurrence which is beyond the control of the lessee, including but not limited to acts of God, inability to obtain permission to use surface overlying the leased premises, legislation or lawful regulations thereunder, court orders, inability to receive, retain or renew in a timely fashion any permit, license or other approval necessary to continue or expand the lessee's prospecting or mining operations or its activities necessary or incident thereto, fire, flood, explosion, strikes, labor disputes, sabotage, acts of the public enemy, riots, civil commotion, acts of any civil or military authority, wars, major failure of mine, plant, facility or equipment, materials shortages, embargoes, and unavailability of transportation facilities (including inability to obtain railroad cars). The lessee shall make all reasonable and diligent efforts to remove any force majeure and resume its performance hereunder with all reasonable dispatch.

29. ARBITRATION. If either party calls for arbitration with regard to an arbitrable matter as provided herein, a board of arbitration shall be established. Each

party shall appoint an arbitrator and the two arbitrators so chosen shall appoint a third disinterested person to act as chairman of the board of arbitration. If the first two arbitrators cannot agree on the third, he shall be appointed by the American Arbitration Association. The decision of any two arbitrators so appointed shall be the decision of the board of arbitration, and such decision shall be binding on the parties. The arbitrators so appointed shall meet within sixty (60) days of the call of arbitration and they shall render their decision within sixty (60) days thereafter. In all other respects, such arbitration and the decision of the board of arbitration thereunder shall proceed under and be interpreted and construed according to the Federal Arbitration Act or succeeding legislation.

30. HEADINGS. Headings as to the contents of particular paragraphs of this lease are inserted only for convenience and are in no way to be construed as a part of this lease or as a limitation or expansion of the scope of the particular paragraphs to which they refer.

31. OBLIGATIONS. While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease and the obligations of its sureties are to the United States as well as to the owners of the leased premises.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above written.

Two witnesses to execution by Lessor:

/s/ John Hill
P.O. 361
Crow/Agency Mont.
P. O. /s/ Illegible

/s/ Illegible

Two witnesses to execution by Lessee:

/s/ Illegible
P. O. /s/ Billings, MT
/s/ Illegible
P. O. /s/ 1016 Billings, MT.

CROW TRIBE OF THE CROW INDIAN RESERVATION

BY: /s/ Patrick Stands Over Bull
CHAIRMAN, CROW TRIBAL COUNCIL

ATTEST: /s/ Illegible
SECRETARY, CROW TRIBAL COUNCIL

LESSOR

WESTMORELAND RESOURCES, a general partnership

BY: /s/ Pemberton Hutchinson
PEMBERTON HUTCHINSON, PRESIDENT

LESSEE

ACKNOWLEDGEMENT OF LESSOR

STATE OF MONTANA)
) ss.
County of Yellowstone)

Before me, a notary public, on this 26th day of November, 1974, personally appeared Patrick Stands Over Bull, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

/s/ Dorothy Marchington
Notary Public for the
State of Montana
Residing at Billings Montana
My Commission expires
3-26-76 .

* * *

ACKNOWLEDGEMENT OF LESSEE

STATE OF MONTANA)
) ss.
County of Yellowstone)

Before me, a notary public, on this 26th day of November, 1974, personally appeared PEMBERTON HUTCHINSON, and acknowledged to me that he is the President of WESTMORELAND RESOURCES, a partnership, whose name is subscribed to the within instrument and acknowledged to me that he executed the same on behalf of said partnership.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

/s/ Dorothy Marchington
Notary Public for the
State of Montana
Residing at Billings, Montana
My Commission expires
3-26-76 .

APPROVAL BY THE SECRETARY OF THE INTERIOR

/s/ Rogers CB Morton

EXHIBIT "A"

Township 1 South, Range 37 East, M.P.M., Big Horn County, Montana

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Section 1: Lots 1, 2, 3, 4, 5, 6, 7, 8, $S^1/_2W^1/_2$, $N^1/_2S^1/_2$
Section 2: Lots 1, $E^1/_2$ of 2, 7, 8, $E^1/_2SW^1/_4NE^1/_4$, $SE^1/_4NE^1/_4$, $NE^1/_4SW^1/_4$, $N^1/_2SE^1/_4$

Township 1 North, Range 37 East, M.P.M., Big Horn County, Montana

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Section 1: $SW^1/_4SW^1/_4$
Section 2: $SW^1/_4NW^1/_4$, $SW^1/_4$, $W^1/_2SE^1/_4$, $SE^1/_4SE^1/_4$
Section 3: $S^1/_2NE^1/_4$, $SE^1/_4$
Section 11: All
Section 12: $SW^1/_4SW^1/_4NE^1/_4$, $W^1/_2$, $W^1/_2SE^1/_4$, $SE^1/_4SE^1/_4$
Section 13: All
Section 14: All
Section 15: $SE^1/_4SE^1/_4$
Section 22: $N^1/_2$, $SE^1/_4SW^1/_4$
Section 23: All
Section 24: All
Section 25: All
Section 26: All
Section 27: $NE^1/_4$, $E^1/_2NE^1/_4NW^1/_4$, $NE^1/_4SE^1/_4NW^1/_4$, $E^1/_2NW^1/_4SW^1/_4$, $NE^1/_4SW^1/_4SW^1/_4$, $E^1/_2SW^1/_4$, $SE^1/_4$
Section 34: $N^1/_2NE^1/_4$, $SE^1/_4NE^1/_4$, $NE^1/_4NE^1/_4NW^1/_4$, $SE^1/_4NW^1/_4$, $E^1/_2SW^1/_4$, $W^1/_2SE^1/_4$, $SE^1/_4SE^1/_4$
Section 35: $N^1/_2$, $N^1/_2N^1/_2SW^1/_4$, $S^1/_2SW^1/_4$, $N^1/_2SE^1/_4$, $S^1/_2SW^1/_4SE^1/_4$, $SE^1/_4SE^1/_4$

Township 1 South, Range 38 East, M.P.M., Big Horn County, Montana

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Section 2: Lots 1, 2, 3
Section 3: Lots 1, 2, 3, 4, S1/2
Section 4: Lots 1, 2, 3, 4, S1/2
Section 5: Lots 1, 2, 3, 4, S1/2
Section 8: Lots 1, 2, 3, 4, N1/2W1/2
Section 9: Lots 1, 2, 3, 4, N1/2N1/2
Section 10: Lots 1, 2, 3, 4, N1/2N1/2
Section 11: Lots 1, 13

Township 1 North, Range 38 East, M.P.M., Big Horn County, Montana

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Section 17: Lot 4, SW1/4, SW1/4SE1/4
Section 18: S1/2NE1/4, NW1/4, S1/2
Section 19: All
Section 20: Lots 1, 2, 3, 4, W1/2E1/2, W1/2
Section 29: Lots 1, 2, 3, 4, W1/2E1/2, W1/2
Section 30: All
Section 31: All
Section 32: Lots 1, 2, 3, 4, W1/2E1/2, W1/2

Containing 14,745.92 acres, more or less.

SETTLEMENT AGREEMENT

THIS AGREEMENT is executed as of November 26, 1974 between THE CROW TRIBE OF INDIANS OF THE CROW RESERVATION ("Crow Tribe") and WESTMORELAND RESOURCES, a general partnership ("Westmoreland").

THE BACKGROUND of this Agreement is as follows:

A. On October 20, 1970, Westmoreland received two Mineral Prospecting Permits from the Crow Tribe ("the Permits") to prospect for coal on two tracts of land in Big Horn County, Montana ("Tract No. 2 and Tract No. 3") pursuant to an auction sale on September 16, 1970.

B. The Permits gave Westmoreland the right to obtain leases from the Crow Tribe of the coal in Tract No. 2 and Tract No. 3, and two Coal Mining Leases, one for each tract, between the Crow Tribe as lessor and Westmoreland as lessee were executed on June 6, 1972 and approved by the United States Bureau of Indian Affairs ("BIA") on June 14, 1972.

C. Since that time various disputes have arisen between the Crow Tribe and Westmoreland regarding the Coal Mining Leases. On July 13, 1974 the Crow Tribe, acting through the Crow Tribal Council, adopted a resolution (Resolution 75-06A) declaring the Coal Mining Leases invalid and directing that action be taken with the Secretary of the Interior or otherwise to establish such invalidity. On or about July 31, 1974 the Crow Tribe filed a Petition with the Secretary of the Interior asking that the Coal Mining Leases be declared invalid, and in the

alternative that they be modified in various ways. Westmoreland filed an Answer to that Petition and several motions, the Crow Tribe filed a Reply, and the matter is now at issue.

D. Following extensive negotiations on October 30-31, 1974, representatives of the Crow Tribe and Westmoreland reached an agreement settling and compromising all their disputes and differences ("the Settlement"). The Settlement is represented by four documents: Amended Coal Mining Lease of Tract No. 2, Amended Coal Mining Lease of Tract No. 3, Land Purchase Agreement, and this Agreement. The four agreements, each of which depends for its effectiveness upon the others, will be submitted to the Crow Tribal Council for approval, and if approved will become effective upon (1) execution and delivery of the agreements by the duly authorized officers of the Crow Tribe and by the duly authorized officers of Westmoreland, (2) written approval of the Secretary of the Interior, and (3) receipt by Westmoreland of an opinion of counsel to the Crow Tribe, that the four documents comprising the Settlement were duly authorized and validly executed by the Crow Tribe and are enforceable in accordance with their terms.

E. The two Amended Coal Mining Leases and the Land Purchase Agreement set forth the terms upon which the Crow Tribe is leasing Tracts No. 2 and 3 to Westmoreland. This Settlement Agreement is intended to signify the agreement of the parties that the Settlement shall forever settle and end their disputes over the Permits and Coal Mining Leases.

THE TERMS of this Agreement are as follows:

1. Upon this Agreement becoming effective pursuant to paragraph D above, and in consideration for the promises and undertakings made by Westmoreland in the Amended Coal Mining Leases and in the Land Purchase Agreement, and for other good and valuable consideration and intending to be legally bound, the Crow Tribe releases and discharges Westmoreland from every claim the Crow Tribe may have, now or arising in the future, known or unknown, that either of the Permits or the Amended Coal Mining Leases was or is invalid or ineffective or unenforceable in any way, or that any term or provision of either Permit or Amended Coal Mining Lease was or is invalid or ineffective or unenforceable. The Crow Tribe, covenants and agrees that it will not, at any time hereafter, in any legal proceeding in any court or in any branch, bureau or office of the government of the United States, or of any state or political subdivision, or of the Crow Tribe, challenge the validity or propriety of either of the Permits or of either of the Amended Coal Mining Leases, or of any provision or term thereof, whether by suit, claim, defense or otherwise, (provided that the Crow Tribe shall have the remedies granted in the Leases or by law for breach of any provision of the Amended Coal Mining Leases or the Land Purchase Agreement, as set forth in paragraph 5 below).

2. Without intending in any way to limit the generality of the foregoing, the Crow Tribe covenants and agrees that it will never claim, and hereby releases all claims, that the Permits or the Amended Coal Mining Leases were or are invalid or improper because:

a. Not preceded or accompanied by an evaluation of the Crow Tribe's coal reserves, either by the Crow Tribe or the BIA; or

b. Permits granted exclusive options in the permittee to obtain leases; or

c. Either of the Permits or either of the Amended Coal Mining Leases included or includes too much acreage, or too much coal (whether in gross or of any particular seam, outcrop or other formation or configuration); or

d. The Coal Leases were not accompanied by valid and binding waivers of any applicable acreage limitation; or

e. Either of the Permits or the Amended Coal Mining Leases was offered for sale or issued under a federal statute, order or regulation that did not apply to or authorize such Permit or Lease; or

f. The term or duration of the Amended Coal Mining Leases, as stated therein, is improper, invalid or unauthorized; or

g. Not preceded or accompanied by a technical examination or technical assessment as that term is used in 25 Code of Federal Regulations 177; or

h. Not preceded or accompanied by an environmental impact statement, or otherwise not issued in compliance with any environmental law, order or regulation of the United States, or of any state or political subdivision or of the Crow Tribe; or

i. Not authorized by the Crow Tribal Constitution or By-laws or by any resolution or other action of the Crow Tribe or any of its committees or other representatives, or in any other manner not properly authorized, approved and executed in compliance with the Crow Tribal Constitution, By-laws, resolutions and other applicable tribal law; or

j. Of any claim of breach by the BIA, the Department of the Interior, or by any other officer, bureau or agency of the United States, of any trust responsibility to the Crow Tribe, or of any law, order or policy for the protection of the Crow Tribe; or

k. Any provision of either Permit or Amended Coal Mining Lease is invalid or improper or not authorized by law, or the permit or lease omits any provision which should have been included under any applicable law, regulation or policy.

3. The Crow Tribe and Westmoreland agree that each will give the other the fullest good faith co-operation, and assist the other in all possible ways, and join with the other in any undertaking that may be advisable, to correct any defect in the Amended Coal Mining Leases or in their authorization, issue and execution, including any proceeding in or request for action by the judicial, executive or legislative branch of the federal government.

4. The Crow Tribe will promptly withdraw its Petition before the Secretary of the Interior by letter stating that the withdrawal is with prejudice to any further proceeding challenging the validity of the Permits or Amended Coal Mining Leases. Without recognizing the

validity or invalidity of the arguments raised in the petition the parties hereto agree that the terms of the Amended Coal Mining Leases and Land Purchase Agreement are unique and represent a settlement that the Crow Tribe finds satisfactory and recognizes the rights of the Crow Tribe, and the parties agree as follows:

a. To ask the Secretary of the Interior for a special waiver under 25 CFR 1.2 of any regulation contained in 25 CFR (including but not limited to parts 171, 173 and 177) that is not consistent with the above-mentioned Amended Coal Mining Leases, Land Purchase Agreement or this Settlement Agreement;

b. To ask the Secretary to find that such a general waiver under 25 CFR 1.2 is in the best interests of the Crow Tribe, as the Tribe has found the documents to be satisfactory in that they provide the financial, economic and social protections that the Tribe deems necessary; and

c. That the Crow Tribe may claim any and all violations of 25 CFR regulations against the BIA relating to any and all other coal permits and leases purportedly entered into by the Crow Tribe, with the exception of the above-mentioned documents between the Crow Tribe and Westmoreland, as further set forth in paragraph 9 below.

5. Should Westmoreland for any reason breach any agreement or undertaking by it contained in either of the Amended Coal Mining Leases or the Land Purchase Agreement, the Crow Tribe shall have all of the remedies granted to it in such documents or by law, but shall not assert, and hereby releases any right it might have to

assert, such breach by Westmoreland as a failure of consideration entitling the Crow Tribe to rescind or cancel this Agreement, or as giving the Crow Tribe any legal ground or right to declare this Agreement breached by Westmoreland, or in any way to treat this Agreement as no longer effective and the Crow Tribe released from its covenants and agreements hereunder.

6. The Crow Tribe will in the utmost good faith and at all times use its best efforts to secure compliance by the BIA, the Secretary of the Interior and all other agencies and representatives of the United States with the covenants and agreements contained herein and will not authorize or permit any officer or agency of the United States to take any of the actions or assert any of the claims which the Crow Tribe has agreed not to take or assert herein.

7. The Crow Tribe hereby approves, and will use its best efforts to secure the approval of the BIA, and of any other agency, bureau or officer of the United States that may be necessary to (i) a sublease by Westmoreland to Northern States Power Company of the Amended Coal Mining Lease of Tract No. 2, and (ii) such reasonable assignments of either or both of the Amended Coal Mining Leases as Westmoreland may from time to time desire to make to lenders or other extenders of credit as security for loans or other extensions of credit to Westmoreland (the Crow Tribe acknowledging the additional financial burdens of development of the coal resources undertaken by Westmoreland as a consequence of the provisions of the Amended Coal Mining Leases), and (iii) any assignment of the Amended Coal Mining Leases by Westmoreland to any partnership, corporation or other entity

resulting from a reorganization of Westmoreland. The Crow Tribe will not unreasonably withhold its approval, where required by applicable law, to any mining plan, reclamation plan or other proposal Westmoreland may make with respect to Tract No. 2 or Tract No. 3. In each of the above cases the Crow Tribe will give its approval without demanding other or further consideration therefor from Westmoreland or others.

8. Westmoreland agrees to pay the royalties provided in the Amended Coal Mining Leases, at the rates therein provided, retroactive to July 1, 1974.

9. The Covenants and agreements of the parties herein shall be binding on and shall inure to the benefit of them and their successors and assigns. However, this Agreement does not confer any benefits or rights on third parties, and this Agreement, which relates solely to the rights of Westmoreland and the Crow Tribe and the relationship between them, shall in no way limit the rights of the Crow Tribe to assert with respect to other permits or leases, involving other permittees and lessees, any claims similar to those it is herein releasing and renouncing with respect to its permits and leases with Westmoreland.

Executed as of the dated [sic] stated at the beginning.

Witnesses:

_____

_____

_____

_____

THE CROW TRIBE OF INDIANS
OF THE CROW RESERVATION

By: _____

WESTMORELAND RESOURCES

By: _____

LAND PURCHASE OPTION AGREEMENT

THIS IS AN AGREEMENT dated the 26th day of November, 1974, between the Crow Indian Tribe of the Crow Reservation, State of Montana (Crow Tribe) and Westmoreland Resources, a partnership of Hardin, Montana (Westmoreland).

WITNESSETH:

For and in consideration of Ten and No/100 Dollars ($10.00) paid by the Crow Tribe to Westmoreland, receipt of which is hereby acknowledged, Westmoreland agrees that if and when it determines, in its own sole discretion, that any tract or parcel of surface acquired by it in connection with any coal mining operations on the lands overlying the coal covered by either of the coal mining leases dated November 26, 1974 (Leases) between the parties hereto is no longer needed in connection with such coal mining operations (which shall include complete reclamation), then the Crow Tribe shall have an

option to purchase all, but not less than all, of such tract or parcel upon the terms and conditions hereinafter set forth. Westmoreland further agrees that it will not unreasonably withhold its determination that any tract or parcel of surface is no longer needed in connection with such coal mining operations.

1. Westmoreland shall give the Crow Tribe notice of its determination that any tract or parcel of land is no longer needed in connection with such coal mining operations.

2. The Crow Tribe shall have sixty (60) days after receipt of such notice given by Westmoreland within which to exercise its option by giving notice to Westmoreland of its exercise of the same.

3. The purchase price shall be the then fair market value of such surface as determined by mutual agreement of the parties.

4. If the parties are unable to agree upon such fair market value within thirty (30) days after the Crow Tribe notifies Westmoreland of its desire to purchase, either party may immediately call for arbitration. In this event, both parties shall select one arbitrator within ten (10) days after the call for arbitration. The two arbitrators so chosen shall appoint a third disinterested person to act as chairman of the board of arbitration. If the first two arbitrators, cannot agree on the third, he shall be appointed by the American Arbitration Association. The decision of any two arbitrators so appointed shall be the decision of the board of arbitration. The arbitrators so appointed shall meet within thirty (30) days of the call of arbitration and they shall render their decision within ten

(10) days thereafter. In all other respects, such arbitration and the decision of the board of arbitration thereunder shall proceed under and be interpreted and construed according to the Federal Arbitration Act.

5. Settlement with regard to any sale hereunder shall take place within sixty (60) days after the earlier of the date upon which the parties mutually agree upon the purchase price or the date upon which the board of arbitration presents its appraisal. At settlement, Westmoreland shall convey title to the Crow Tribe by quit claim deed or an agreement to deliver a quit claim deed and the Crow Tribe shall pay the purchase price in a manner agreed upon by the parties. Nothing herein shall prevent the United States from accepting such surface in trust for the Crow Tribe.

6. The Crow Tribe expressly acknowledges that Westmoreland has previously conveyed to or caused to be reserved to third persons various rights to purchase, options, licenses, easements, leaseholds and security interests affecting the lands described in this Agreement. The Crow Tribe further acknowledges that the option to purchase created by this Agreement shall be subject and subordinate to any of the foregoing described interests conveyed to or reserved by third persons either before or after the date of this Agreement, and that this Agreement shall not prevent Westmoreland from creating any such interest in any such third persons after the date of this Agreement.

7. If the Crow Tribe does not exercise its option as required by paragraph 2 or does not proceed to settlement as required by paragraph 5, its option shall terminate as to the particular parcel of [sic] tract of surface with regard to which Westmoreland gave notice as required by paragraph 1. If the Crow Tribe's option terminates as provided in this paragraph, the Crow Tribe shall furnish to Westmoreland evidence reasonably required by Westmoreland of the termination of such option.

8. All notices required to be given hereunder shall be in writing and shall be delivered by registered mail postage prepaid, and addressed as follows:

(a) If the Crow Tribe to:

Superintendent of the Crow Reservation
Crow Agency, Montana 59022

With copies to:

Chairman – Mineral Committee
Chairman – Crow Indian Tribe
Chairman – Land Purchase Committee

All of Crow Agency, Montana 59022

(b) If Westmoreland to:

2703 Montana Avenue
Billings, Montana 59103

Notice by mail shall be deemed complete when deposited in the United States Post Office as provided above. Any change of address shall be communicated in the same manner as notice provided above.

9. Both parties agree that the times for performance set forth herein are essential to this Agreement.

10. The benefit of this Agreement shall extend to and it shall be binding upon the parties hereto, their successors and assigns.

11. This Agreement, and all rights and obligations hereunder, shall terminate on the expiration of twenty-one (21) years from the date of the death of the last surviving of Patrick Stands Over Bull, Tyron L. Ten Bear, Robert Yellowtail, Jr., and Oliver Hugs.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first above written.

WESTMORELAND RESOURCES

By _____

CROW TRIBE OF INDIANS OF THE CROW INDIAN RESERVATION

By _____
Chairman, Crow Tribal Council

ATTEST:

_____
Secretary, Crow Tribal Council

_____

STATEMENT OF THE CROW TRIBE OF INDIANS
IN OPPOSITION TO SENATE BILL 13
PROVIDING FOR A SUBSTANTIAL INCREASE
IN MONTANA STATE COAL TAXES

TO: Members of the Montana Legislature

FROM: Pat Stands, Chairman, Crow Tribe of Indians
Robert Yellowtail, Jr., Vice-Chairman, Crow Tribe of Indians

Introduction

The Crow Tribe of Indians is currently establishing a plan for the development of its treaty reserved coal resources. A portion of the Crow Tribe's coal is presently being mined by Westmoreland Resources on an area north of the Crow Reservation called the "Crow Ceded Strip". Other mining operators hold permits and leases on the Ceded Strip and on the Crow Reservation. At this time the Crow Tribe is involved in a careful process of determining the extent to which its coal reserves should be mined. As a part of this decision making the Tribe is evaluating the social and environmental impacts of coal mining, side by side with the significant economic advantages which the Tribe will derive from mining. The Crow Tribe believes that significant social and environmental injury may occur if mining is undertaken without proper planning, and if a number of associated large-scale power generating facilities and conversion plants are constructed on or near the Crow Reservation. To that end the Crow Tribe has inserted in its leases with Westmoreland Resources and will insist as a condition to other mining

that no power generating or conversion facilities can be developed without the express consent of the Crow Tribe.

The Crow Tribe believes that the State of Montana has an important governmental responsibility in the development of these Indian resources, particularly where the development takes place on the Crow Ceded Strip where the surface is controlled by non-Indians. The role of the State of Montana is substantially reduced where development takes place on the Crow Reservation, for under long-standing principles of federal law the Crow Tribe retains important sovereign Indian powers, and exercises governmental and proprietary jurisdiction over the people and property within its reservation. Of course, on the Reservation, the Crow Tribe and the United States are responsible for providing nearly all governmental expenditures required by the Crow people.

Given the Crow Tribe's status as the owner of large coal reserves, and as the governmental body primarily responsible for controlling mining on or near the Crow Reservation, we are very disturbed about the levels of taxation proposed in Senate Bill 13. We basically have two objections to the taxes proposed in that senate bill: (1) that they are so out of line with taxes imposed by other neighboring states that Crow coal will no longer be competitive and therefore our coal development program will suffer, and (2) that the taxes bear no relation to the responsibilities and burdens which coal development has imposed on the State of Montana – indeed insofar as these taxes would relate to coal development on the Crow Reservation they may constitute not merely high taxation, but a "taking" of private treaty-reserved Indian coal.

A. Economic Aspects

Crow coal competes with coal which is mined at Colstrip, Montana and Decker, Montana, and in the Powder River Basin of Northern Wyoming. To date the primary customers of these mining operations have been middle western and southern utilities which have purchased the coal for delivery for burning in their power generating facilities. The transportation costs are very large and as a result the minor differences in transportation costs between the coal mined in Montana and coal mined in Wyoming play a significant role in determining the overall price of the coal and therefore the overall competitiveness of the coal. Also the quality of the coal as well as the reclamation fees and state taxes placed on the coal become significant in determining the economics of mining Montana coal. Generally speaking Crow coal is of comparable quality with most Wyoming coal although it is of lower quality than coal being mined in Decker, Montana. At the same time, the reclamation costs imposed by the State of Montana on Crow coal presently being mined on the Crow Ceded Area as well as the existing State of Montana taxes impose costs on the selling price of Crow coal which are substantially in excess of costs imposed by the neighboring states. We are concerned about the current status of these unequal costs. We believe that to substantially increase the taxation of Montana coal will be to seriously jeopardize the ability of the Crow Tribe and its mining operators to sell coal in the marketplace.

It is our understanding that the Montana Legislative Interim Committee on Coal Taxes published comparative state coal tax numbers for the year 1973 and found the

following figures: State of Montana, 12.4% of gross value of coal for all state coal taxes; State of Wyoming, 6.8% of gross value of coal for all state coal taxes; State of Kentucky, 5.5% of gross value of coal for all state coal taxes; North Dakota, negligible taxation.

It can be seen from these figures developed by a Montana legislative committee that through 1973 the State of Montana imposed taxes which were almost twice that imposed by its nearest competitor, the State of Wyoming. It is our understanding that Senate Bill 13 would operate to substantially increase this total package of state taxation. The calculations which we have made suggest that on new tonnages selling for approximately $5.00 a ton, the Montana license or severance tax would jump from the present figure of approximately 34¢ per ton on BTU coal of the quality being mined by the Crows to a figure of $1.25. Our figures would also suggest that the present net proceeds tax which is imposed by the counties of the State of Montana would substantially increase in future years from the present approximate figure of 25¢ per ton. In effect, if Senate Bill 13 were to be enacted we could project that for the year 1975 Montana taxes would be in excess of $1.50 per ton of coal mined. This figure would approximate 30% of the gross mine value of the coal.

We find this proposed tax to be prohibitory. We do not believe that it bears any relationship to the costs to the State of Montana which will result from strip mining. When it is remembered that the State of Montana is already exacting substantial fees to cover the cost of reclamation for lands subject to mining, it becomes clear that the only other legitimate state interest which the

State of Montana has, aside from reclamation, is in the social impact which mining has. We have learned while planning development of our coal reserves that the social implications from mining vary tremendously from operation to operation. Thus for example, there is relatively little social impact from the establishment of a mine when the coal is to be delivered out of state, whereas if there is developed an associated power complex or conversion facility then a substantially increased social impact occurs. We cannot believe, therefore, that simply imposing a large tax against the mining of coal itself can be justified.

To the extent the State of Montana has a legitimate governmental concern about the social and environmental impacts resulting from mining, taxation of that mining to pay the costs resulting from mining is justified. However, we do not believe that the proposed taxes which will result in taxation four times greater than being imposed by any other state, are justified. Rather than imposing an arbitrary and blanket tax on all coal mining, we would suggest that the State establish a method of imposing coal taxes so that the tax imposed would bear a direct relation to the social costs involved in mining and in the associated uses of the coal.

B. Indian Treaty Right Aspects

The Crow Tribe objects to the proposed taxes contained in Senate Bill 13 not only because we believe that they will place Crow coal in an uncompetitive position and are unwarranted in terms of the legitimate state interests involved, but also because the Crow Tribe

believes that this level of taxation is so high that it creates a serious likelihood that Crow coal cannot be marketed. If that is the case, the coal tax becomes an unauthorized state interference with federally secured Indian property. Federal law will not allow such an unauthorized interference. Indeed, in the Montana Enabling Statute, Act of May 21, 1864, Chapter 95, 1st Sess., 38th Cong., the United States conditioned the admission of the State of Montana into the Union on the understanding that the State of Montana would not impair the rights of Indian property and persons existing within its boundaries. This lack of state jurisdiction over Indian property and Indian persons has been recognized on numerous occasions. *Kennerly v. District Court of Montana*, 401 U.S. 423 (1971); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). Indeed, federal law recognizes that Indian property interests are to be likened to private property interests protected from arbitrary taking by the Fifth Amendment to the United States Constitution. *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941); 25 U.S.C. §§ 70, *et seq.*

To the extent that the State of Montana may have a legitimate governmental interest in imposing taxes on Indian mineral development, clearly the State cannot tax beyond a level which is justified in terms of the state costs incurred as a result of such mining. Whatever legal restrictions may be imposed on the State of Montana with respect to the taxation of non-Indian minerals, clearly an even greater limitation exists with respect to the taxation of Indian minerals. Indian minerals have a unique legal status. Unlike coal resources owned by private individuals or by state or federal governments, tribal and individual Indian coal deposits have been reserved by federal

treaties. Pursuant to such treaties these mineral rights are held in trust by the United States for the Indian beneficiaries. The Crow Indian Tribe owns coal reserved by it in treaties with the United States concluded in 1851 and 1868. The reservation of these mineral rights constituted an important consideration to the Tribe in agreeing to cede large areas of territory to the United States. It is these large areas which subsequently became portions of the States of Montana and Wyoming. Imposition of excess state coal taxes would be inconsistent with the provisions of these treaties, and would place the coal tax policies of the State of Montana in conflict with significant federal policies relating to the protection of Indian trust properties and the encouragement of Indian economic development.

We believe there is no justification for allowing the State of Montana to reap a large tax windfall because the State's territory abuts the Reservation of the Crow Tribe which is rich in coal deposits. We have expressed in the past a willingness to work with the State of Montana so as to assure that mining development on or near the Crow Reservation will be undertaken in a way which will minimize the environmental and social impacts. In opposing Senate Bill 13 we do not intend to dislodge the State of Montana from its proper governmental responsibilities – we seek only to demonstrate that the tax levels proposed in Senate Bill 13 bear no relation to legitimate Montana state interests, and threaten to jeopardize the right of the Crow Tribe of Indians to exploit its treaty-reserved trust minerals.

TAXATION COMMITTEE

March 27, 1975

Chairman Ora J. Halvorson called the subcommittee on Senate Bill 13 to order at 8:30 a.m. in room #108, Capitol Building, Helena. Reps. E. N. Dassinger and David Aageson committee members were present.

Amendments, copy of which are marked Exhibit A, attached hereto were discussed. Rep. Dassinger moved that they be not adopted. Motion carried with Reps. Aageson and Dassinger voting Yes, and Rep. Halvorson voting against the motion.

The feeling was that there would have to be court decreed settlements regarding Indian coal revenues.

Rep. Dassinger moved acceptance of an amendment allowing 5,000 tons of coal to be produced in a quarter-year without taxation. Motion carried unanimously.

Rep. Dassinger moved that the pyramiding effect in SB 13 be removed. Motion failed with Reps. Halvorson and Aageson voting No, and Rep. Dassinger voting Yes.

Rep. Halvorson moved that Senate Bill 13 with the suggested amendments come out of the subcommittee with no recommendation. Motion carried with Reps. Halvorson and Aageson for the motion, and Rep. Dassinger against the motion.

Meeting adjourned at 8:50 a.m.

/s/ Ora J. Halvorson
REP. ORA J. HALVORSON,
Chairman

SENATE BILL NO. 13

An amendment to provide a credit against state severance taxes for tax payments made pursuant to a federally approved Indian Tribal Tax.

Be amended in the third reading copy of the bill as follows:

1. Amend page 9, line 5
   Following: "both."

Insert: A new section to be known as Section 13 to read as follows: "Section 13. A credit against the state severance taxes provided for in this chapter shall be granted the producer of coal for each dollar paid an Indian tribe pursuant to an approved tribal tax if the following conditions are met:

(a) The coal produced is held in trust by the United States for the benefit of a federally recognized Indian tribe or Indian allottee,

(b) The coal is produced within the boundaries of a federally recognized Indian reservation,

(c) The Indian tribe has enacted a tribal mineral tax which has been approved by the Secretary of the Interior, and

(d) The revenues received from the tribal mineral tax will be used to upgrade tribal governmental services

2. Amend on page 9, line 6
   Renumbering "13" to become "14"

3. Amend on page 15, line 24
   Renumbering "14" to become "15"

4. Amend on page 16, line 25
   Renumbering "15" to become "16"

5. Amend on page 20, line 6
   Renumbering "16" to become "17"

6. Amend on page 20, line 12
   Renumbering "17" to become "18"

THE FREE JOINT CONFERENCE
COMMITTEES ON COAL TAXATION

April 14, 1975

NOTICE

The conferees on the coal tax bills have authorized the printing and distribution of this report, which reflects their final decisions. However, the conference reports have not been signed yet and this statement is solely for the information of the members of the legislature.

/s/ Roger Tippy
Roger Tippy, Staff Attorney

CONFEREES

FOR THE SENATE:

Dave Manning, Chairman

Thomas E. Towe

William L. Mathers

FOR THE HOUSE:

Ora J. Halvorson, Chairman

Harrison Fagg

Daniel Kemmis (on SB13, SB87)

Thomas Conroy (on SB86, HB663)

E.N. Dassinger (on HB115, HB642)

The free joint conference committees appointed to resolve the differences in Senate Bills 13, 86, and 87 and House Bills 115, 642 and 663, having met every day during the week of April 7-12, recommended that SB13, SB86, and SB87, be further amended and approved, that HB642 and HB663 be approved as amended by the Senate, and that HB115 be postponed, since it contains essentially the same provisions as SB13. The conference committee's recommendations represent a fair compromise of the divergent viewpoints of the individual conferees.

In setting the level of the tax, the conference committee looked at the needs to be met. The objections were to (a) preserve or modestly increase revenues going to the general fund, (b) to respond to current [illegible] impacts attributable to coal development, and (c) to invest in the future, when new energy technologies reduce our dependence on coal and mining activity may decline. The conference concluded that a severance tax of 20% on low-grade lignite and 30% on other coal, plus a gross proceeds tax running at around 4-5% on all coal, was necessary and equitable.

It is true that this is a higher rate of taxation than that levied by any other American state on the coal industry. The tax must be determined on the basis of Montana's needs rather than on other states' response to coal development. Wyoming's supposed competitive advantage has been constantly cited by the coal industry – Wyoming coal taxes appear to be about 7% of the f.o.b. mine price now. When we look south to Wyoming, we should also

look north to Alberta. The province, owning most of its plentiful oil and gas reserves, collects its rent by means of royalty rather than severance tax. Alberta gas that cost 20 cents at the Montana border 18 months ago now costs 99 cents – and all the increase is royalty payments to the province. Alberta is investing its wealth in its universities, hospitals, reduction of other taxes, etc., and the consumers of Alberta gas, in Montana and elsewhere, have no choice but to finance this program. Wyoming keeps its taxes low, attracts a rapid buildup of coal development, and receives a collection of problem-ridden boom towns like Rock Springs and Gillette.

While coal is not as scarce as natural gas, most of the Montana coal now produced is committed for sale under long-term contracts and [illegible] be purchased with this tax added to its price. A tax differential between Montana and Wyoming may shift some new contracts to Wyoming. If the coal industry grows somewhat more slowly in Montana, the small communities in the eastern part of the state will have time to grow in a more orderly fashion. That the coal industry will grow even with this tax is not doubted by the conference committee. The 20% severance tax on lignite, together with the gross proceeds tax, is close to the severance and conversion taxes recently enacted by the North Dakota legislature. The combined coal reserves of Montana and North Dakota are simply too great a part of the nation's fossil fuel resources to be ignored because of taxes at these levels.

The taxes proposed in Senate Bill 13 are constitutionally sound. If the enactment of a tax is within the authority of the Legislature, the level of that tax will not be examined by the courts under the due process clause

(*Pittsburgh v. Alco Parking Corp.*, 417 U.S. ___, 94 S. Ct. 2291). As a tax on an activity or occupation, it is not a burden on interstate commerce (*Oliver Iron Co. v. Lord*, 262 U.S. 172, 179).

The equal protection standards set by the Supreme Court of Montana in *Sigety v. State Board of Health*, 157 Mont. 48, are met in Senate Bill 13. The conference discussed the jurisdiction of the state over coal mined on Indian reservation lands or ceded lands within reservation boundaries such as at Sarpy Creek. Since the tax falls upon an activity or occupation by non-Indians which has not been comprehensively regulated by Congress, there is a suggestion in *Warren Trading Post v. Arizona Tax Commission* (380 U.S. 685, at p. 691 note 18) that such a tax is permissible.

Since the amendments to Senate Bills 13 and 87 proposed by the conference committees are rather extensive, the conference has prepared section-by-section summaries of these bills as reported. The conference agreed to accept the Senate amendments to House Bills 642 and 663, and the reference bills are the recommended versions. The conference agreed to accept the House amendments to Senate Bill 86 and to insert two brief amendments to the bill. These amendments reduce the allocation to alternative energy research and appropriate the moneys allocated in the first biennium for that purpose.

The summaries of SB13 and SB87 are as follows:

Senate Bill 13

Section 1

The findings recite facts supporting the classification of coal into a unique category for taxation purposes and recognize subcategories based upon differences in mining methods (surface or underground) and between types of coal (sub-bituminous, over 7,000 BTU per pound, and lignite, under that BTU rating). The conference reinstated a finding in the introduced bill which states that lignite's market is not as strong or widespread as the market for sub-bituminous. Thus, while sub-bituminous coal producers can afford to pay royalties and production taxes equal to at least one-third of the total price f.o.b. mine, as another conference amendment states, lignite producers can afford less.

Section 2

The determination of coal's value is the most important aspect of the definitions section. The conference agreed to accept the House amendments defining value so as to exclude production taxes. This eliminates the tax pyramiding issue which was debated in the interim study committee report. Production taxes are defined to include the severance and gross proceeds taxes proposed in the bill the resource indemnity trust tax provided under other state law, and possible future taxes such as the reclamation tax proposed in the federal strip mining bill now before Congress.

Section 3

The severance tax rate decided by the conference is 20% of value on low-grade lignite and 30% of value on all grades of coal rated over 7,000 BTU per pound. This is a compromise between the flat 28.5% rate last approved by the House and the 15-30-30-30% rates last voted by the Senate. The conference agreed to the House amendment exempting up to the first 20,000 tons a year produced by any person, whether he operates one or more mines.

Section 4

Section 4 is essentially a restatement of section 84-1306 in the present code. The wording remains as drafted by the interim study committee, except for the last sentence, added by the conference. This sentence is derived from Senate Bill 144 and relates to the penalty and interest provisions of section 5 by allowing the department discretion to extend the filing time for the severance tax before penalties and interest accrue.

Section 5

This section was inserted by the conference to impose a 10% penalty and monthly interest at 1% on delinquent taxes. These provisions were contained in Senate Bill 144, which was held in the House. It was one of a series of department bills (the others have been enacted) adding penalties and interest to the collection procedure, for various license taxes.

Section 6

Section 6, also unchanged from the interim study draft, is a rephrasing of code section 34-1302, subsections (4), (5), and (6).

Section 7

Section 7 sets out the authority of the department of revenue to impute value to coal which is not marketed in an arm's length commercial transaction. The conference amended the bill to clarify that coal used in any manufacturing process (such as the proposed fertilizer plant near Circle) is subject to this section.

Section 8

The disposition section was amended by the House in a house-keeping manner to conform with the treatment of the same section in Senate Bill 87. The codifier is expected to assemble a composite section showing the various earmarked revenue accounts which receive portions of the severance tax, and to insert these as subsections between the county share and the subsection allocating the balance to the general fund. The conference agreed to revise the county's share from 5% to 4% for the period until 1980 and after that, to leave the county's share on a permanent percentage basis at 3½%.

Section 9

This is a reporting section for the purpose of computing the gross proceeds tax. The form for this report could be coordinated with the severance tax reports – gross

proceeds are identical to the annual aggregate value, as derived from the contract sales price, which would appear on four quarters of severance tax returns. The only difference in the value taxed is that the 20,000-ton annual exemption does not apply to the gross proceeds tax.

Section 10

Under this section, the department will aggregate the gross proceeds of all coal mines within a county and report the figures to the county assessor.

Section 11

This section governs the actions of the assessor and treasurer with respect to gross proceeds reports as these officers now handle net proceeds of mines.

Section 12

This section creates a lieu [sic] for unpaid gross proceeds or severance taxes and authorizes the department to take appropriate legal actions to collect the taxes.

Section 13

This section provides criminal penalties similar to those enacted for enforcement of existing coal taxes.

Section 14

This section takes coal out of the first class of property tax purposes of the local property tax – the net proceeds of mines category – and inserts the gross proceeds of an underground coal mine in a class taxed at 33 1/3% of value, and creates a new class for the gross proceeds of a strip coal mine taxed at 45% of value. The classifications thus made are amply buttressed by the findings made in section 1 and should satisfy the equal protection standards applied by any court. The committee intended that the value of gross proceeds is to be placed on assessment rolls at 100% of value as net proceeds of other mines are so placed.

Section 15

This section, as amended by the House and so accepted by the conference, sets the taxable value of strip coal mines at 45% of total value of the gross proceeds. The 45% factor is based upon Department of Revenue calculations that most strip mines have historically deducted about 55% of their gross proceeds before taxes as operating expenses in order to compute net proceeds. A levy of 100 mills, about average in the coal mining districts, makes the gross proceeds tax equivalent to another 4 1/2% on the sale price of the coal.

Section 16

The effect of this section is to remove coal mines from chapter 54, Title 84, which prescribes reporting procedures for the net proceeds tax. Royalties, which are

separately assessed for net proceeds purposes, would not be so treated under this bill. The coal producer's value subject to the gross proceeds tax would include his royalty payments. The producer and the royalty owner would negotiate in their contract such allocation of the gross proceeds tax and severance taxes as they agreed upon.

Section 17

This is a new section inserted by the conference committee. It is based upon the premise that any spiralling effect between percentage royalties and percentage taxes can be eliminated very simply by defining value for royalty purposes as before-tax value, just as value is so defined in the bill for tax purposes. This is established as a policy for the board of land commissioners in future leases of state lands and as a guideline for courts construing Montana law to interpret any coal lease. The changes in state lands royalties enacted by House Bill 533 are superceded [sic] by this section to the extent of any inconsistency between the two statutes.

SENATE BILL 87

Section 1

This is the declaration of purpose. The conference added a reference to the county land planning assistance program created [illegible] Section 14.

Section 2

This section creates the various accounts within the earmarked revenue fund into which portions of the severance tax are paid. The conference added an account to fund county land planning assistance.

Section 3

This is the section which slices the pie. The conference agreed to retain the 4-year program to rebuild highways in the coal development region and to adopt the Senate version of the allocation to the local impact and education account. The county share and the other earmarked accounts were revised. As reported, the bill has two allocation formulas, one for the present and the other for the period beginning January 1, 1980. (The coal area highway improvement ends June 30, 1979.) Taking all allocations made by the various [illegible] into account, the formulas are as follows:

1975-1979	1980 and afterwards
School equalization – 10%	10%
Local impact & education trust – 30%	40%
Coal area highway improvement – 10%	–
County where coal is mined – 4%	3½%
Counties land planning – 1%	–
Alternative energy research – 2½%	4%
Renewable resource development – 2½%	2½%
General Fund – 40%	40%

Section 4

This section establishes a four year program, ending June 30, 1979, to reconstruct twelve segments of primary and secondary highways in a designated area encompassing all or parts of Big Horn, Rosebud, and Treasure counties. The Department of Highways has estimated the work needed on these roads at $52 million dollars [sic]. The anticipated revenue to this account from the coal tax is between $15 million and $16 million over the four years, and federal matching funds from the U.S. Department of Transportation are expected to be available on a 74-26 basis. The roads in question lead to the four major strip mines in the state, and these roads have deteriorated under the heavy pressure associated with mine development. It is equitable to apply a part of the coal tax to reconstruct these roads, for just as the mines have brought about bad roads, the mines and their workers will benefit from good roads.

Section 5

This section deals with the composition of the coal board, the agency which makes grants to benefit local governments impacted by coal development. The conference completely rewrote the section after agreeing that the appointing discretion should basically be in the governor. His discretion is bounded by the requirements that two of the seven members must have expertise in school matters and two others must reside in coal-impacted areas. There are no specific requirements for the other three appointments to the board but in making any of the seven appointments, the governor is to consider the

desirability of having experience in business, public administration, planning and engineering.

The appointments are to be made under the section providing for quasi-judicial boards in the executive reorganization act. The bill does not designate the coal board as quasi-judicial, however, so the requirement in section 82A-112 that one member must be an attorney does not apply to this board. The relevant provisions of 82A-112 provide for four-year terms, senate confirmation of appointments, removal, filling of vacancies, and so forth.

Section 6

This provides for the election of the chairman of the coal board, meetings, and compensation of members ($25 a day plus actual and necessary expenses).

Section 7

This section gives the board powers to administer the grants program. The conference amended subsection (4) to require that a minimum of one-third rather than one-fourth of the money paid into the local impact and education account must remain in the educational trust fund, and after termination of the highway account in 1979, one-half of the account would go to the trust level. Since one-third of 30% is 10%, this amendment brings SB 87 into conformity with SB 177, which was held in the House. After 1980, the educational trust fund will receive a minimum of 20% of total severance tax collections. The conference accepted the House amendments to allow the board to make grants to state agencies to assist local

governments. The conference rejected the House amendment requiring the coal board to consider the availability of matching funds, and in lieu thereof, inserted a provision that the board consider the degree of effort by local governments to deal with impact problems. The conference intends impact to also include consequences within Montana of coal development just outside the borders.

Section 8

This section establishes priorities in the awarding of impact grants by the coal board. At least half the grants must go to counties, towns, and school districts experiencing a population growth of at least 10% in any three-year period since 1972. Subsection (3) provides for the possibility that not all funds available for impact grants may be awarded by stating that unused funds may be appropriated to the educational trust fund. The conference definitely felt that the maximum sums available for local impact grants might not be appropriated for that purpose after the first several years at [sic] adjustments in the impact areas, and that such moneys would automatically revert to the trust fund. The conference added an amendment to clarify that moneys in the educational trust fund could not be appropriated for local impact grants.

Section 9

The conference amended this section to reflect the change of name from Department of Intergovernmental Relations to Department of Community Affairs. The

department is to provide office space and staff for the coal board.

Section 10

This provides procedures for grant applications. The House amendments allowing state agencies to receive a maximum of 5% of grants by the board were accepted by the conference. This sum is intended for use by state agencies only for the purpose of helping local governmental units to analyze and evaluate their own needs for local impact assistance and not for the purposes of providing state services needed as a consequence of coal development.

Section 11

The educational trust fund is established in this section. The conference added an amendment to incorporate one of the features of Senate Bill 177, that 10% of the interest income from the fund must be added to the principal each year. The other 90% is divided on a three-to-one basis between public school equalization aid and the university system.

Section 12

This amends the code section providing for earmarked revenue to state equalization aid. The conference added an amendment reflecting its decision to place 10% of the severance tax (in addition to 3/4 of 90% of the trust fund income) into equalization.

Section 13

This section appropriates funds to the coal board for its first two years of operation. The conference made two amendments. The first reduces the appropriation down to two-thirds of the funds in the local impact and educational trust fund account, to accord with the amendment in section 7 increasing the trust fund percentage. The second directs the coal board to transfer funds to the legislative review committee established by section 15, as needed to fund operations of the committee.

Section 14

This section was added by the conference to fund county responsibilities under House Bill 672, the Economic Land Development Act. 1% of the severance tax is allocated to the Department of Community Affairs until the end of 1979, to be apportioned to the 56 counties of the state on a combined area-and-population basis. The counties are to use the funds for inventorying and classifying lands in order to comply with the provisions of HB 672. Any unused funds revert to the educational trust fund.

Section 15

The conference added this section to create an eight-member bi-partisan legislative review committee to monitor the expenditure of coal tax monies under this bill, Senate Bill 86, and House Bill 642. The conferees feel that the expenditures in some of these new program areas are ventures into unchartered [sic] water. The 1977 legislature

may need to amend the authorizing statutes for these programs. Thus, a continuation of the work of the 1974 joint interim subcommittee, and of the House subcommittee set up during the 1974 session, is an essential part of the entire coal tax package.

AN ORDINANCE CREATING A METHOD FOR THE TAXATION OF COAL BY THE CROW TRIBE OF INDIANS AND KNOWN AS THE CROW TRIBAL COAL TAXATION CODE

Section 1. Title. This ordinance shall be known as the Crow Tribal Coal Taxation Code.

Section 2. Purpose. Since the mining of Crow coal resources represents the perpetual loss of a non-renewable and valuable tribal asset, the Tribe will be indemnified for the extraction of those resources. The receipt of revenue from this tax will allow the Tribe to upgrade and improve governmental services, especially the increase in those services needed to insure against damage to the total social, cultural, economic and environmental well being of the Crow Tribe that may occur as a result of the extraction of coal.

Finally, the imposition of a tax on coal resources will discourage resource waste and thus insure that adequate amounts of mineral resources will be available for future generations of the Crow Tribe. In addition, the revenue of said tax will enable the Tribe to establish, manage and control programs designed to offset the effect of mining of Crow coal.

Section 3. Definitions.

(a) "strip mining" means any part of the process followed in the production of mineral by the open cut method including mining by the auger method or any similar method which penetrates a mineral deposit and removes mineral directly through a series of openings made by a machine which enters the deposit from a surface excavation or any other mining method or process in which the strata or overburden is removed or displaced in order to recover the mineral;

(b) "underground mining" means a coal mining method using shafts and tunnels;
(c) "person" means a person, partnership, corporation, association, or other legal entity, or any political subdivision, or agency of the state;
(d) "operator" means a person engaged in coal mining who removes or intends to remove more than 10 tons of coal from the earth in a period of one year;
(e) "Tribal Council" means the Crow Tribal Council as described in the Crow Constitution and By-law;
(f) "Designated Committee" means a committee specifically appointed to oversee the management of this code by the Crow Tribal Council in accordance with Article I, Section IV of the Crow Constitution and By-laws;
(g) "ton" means two thousand (2,000) pounds;
(h) "contract sales price" means either (1) the price of coal severed and prepared for shipment f.o.b. mine, or (2) a price computed by the Tribal Council under Section 6 of this code;
(i) "Treasury" means Department of Treasury of the United States.

Section 4. Coal Mining Tax. A person engaged in or carrying on the business of coal mining, or engaged in the business or working or operating a coal mine or coal mining property from which marketable or merchantable coal of any kind is severed or produced by means of strip coal mining, or underground mining, whether the person carried on the operations as owner, lessee, trustee, possessor, receiver or in any other capacity, must for the year this code becomes effective and each year thereafter, pay to the Treasury for the use and benefit of the Crow Tribe of Indians, a tax for engaging in and carrying on the operations described above. Said tax shall be paid according to the schedule listed in Section Six (6) below.

Said tax will be imposed on each ton of marketable or merchantable coal severed or produced by means of strip coal mining or underground mining by a person within the Crow Indian Reservation used by him or shipped and delivered by him to another person for shipment, sale, or use by the other person; provided, however, that nothing in this ordinance requires laborers or employees, hired or employed, by a person to mine coal, or to work in or about or in connection with a strip coal mine to pay taxes, nor is work required to be done in prospecting for, or in developing or in opening up a coal mine or coal mining property, considered to be the carrying on of a coal mining business for the purpose of this tax, or the engaging in the business of working or operating of a coal mine.

However, in the event that during the work of developing or opening up a coal mine or coal mining property, coal is severed or produced by means of strip mining or underground mining and sold, then this is considered the carrying on of a strip coal mining business and the engaging in the business of working and operating a strip coal mine.

Section 5. Scope of Tax. The tax described in Section 4 above applies to all persons engaged in or carrying on the business of coal mining within the boundaries of the Crow Indian Reservations. The boundaries of the Reservation shall include the mineral estate held in trust by the United States for the Crow Tribe under that property known as the "Ceded Area" wherein the surface was ceded but the mineral estate was retained by the Act of April 27, 1904; 33 Stat. 352.

Section 6. Amount of Tax. The license tax paid under Section 4 above is computed to be ___% of the value of each ton of coal. For purposes of this section,

value of the coal means the "contract sales price" as defined in Section 3 above.

Section 7. Imputing the Value of Coal. The value of coal may be imputed by the Tribal Council or its designated committee in cases where

(a) the operator of a coal mine is using the produced coal in an energy conversion process, or

(b) a person sells coal under a contract which is not an arm's-length agreement, or

(c) a person neglects or refuses to file a statement and tax return under this chapter, the Tribal Council or its designated committee may impute a value to the coal which approximates fair market value f.o.b. mine. When imputing value, the Tribal Council or its designated committee may apply the factors used by the federal government under 26 U.S.C. section 613, or that provision as it may be labelled or amended, in determining gross income from mining, or the Tribal Council or its designated committee may apply any other or additional criteria it considers appropriate.

Each subject taxpayer shall, upon request by the Tribal Council or its designated committee, furnish a copy of its federal income tax return, with any amendments, filed for the year in which the value of coal is being imputed and copies of any contracts under which it is selling coal at the time. When the estimate of fair market value by the Tribal Council or its designated committee is contested in any proceeding, the burden of proof is on the contesting party.

Section 8. Payment of Tax. Payment shall be made in quarterly installments to the Treasury in trust for the Crow Tribe of Indians for the quarters ending, respectively, March 31st, June 30th, September 30th

and December 31st of each year. Said payment shall be due within 15 days of the end of the respective quarter as listed above.

Section 9. Filing of Statements. Each person engaged in mining coal must, within thirty (30) days of the end of each quarter, file a statement of the gross yield in tons from each coal mine owned or worked by such person in the quarter just ended and the value of all marketable or merchantable coal severed or produced therefrom. In addition, the statement shall include average BTU value of the production and the contract sales price received for the production.

The statement shall be filed with the Chairman of the Crow Tribe, any committee of the Tribe designated to receive same and the Office of Coal Research. Every operator shall keep a record of all coal mined, severed or produced, and of all coal sold or otherwise disposed of by such person, and such records shall at all times during the business hours of the day be subject to the inspection by the Crow Tribal officers and their duly authorized representatives.

Section 10. PENALTY FOR LATE TAX. If any person, shall fail, neglect or refuse to file any statement required by Section 9 above, or shall fail to pay the above tax, within the required time periods, the Crow Tribal Council or its designated committee shall proceed to inform itself regarding the number of tons of marketable or merchantible coal mined, extracted or produced by such person during such quarter and shall determine and fix the mount of taxes due to the tribe from such person for such quarter and shall add to the amount of such taxes, ten percent (10%) thereof as penalty and shall send such statement by certified mail to such persons along with a statement of interest accruing at the rate of eight percent (8%) per

annum from the date of making the statement until the amount is paid.

Section 11. Binding Effect. The provisions of this code shall be binding upon any person or operator engaged in the mining of coal on the Crow Indian Reservation as of the effective date of this ordinances.

Section 12. Jurisdiction. It is the express interest [sic] of this ordinance pursuant to Section 11.1, Title 25, Code of Federal Regulations, to replace or supercede [sic] any or all parts, sections or provisions of Subchapter B, Title 25, Code of Federal Regulations, which may be inconsistent.

Furthermore, any violation of this code will be actionable in the Tribal Court of the Crow Tribe of Indians as either a civil action or a criminal action in the nature of a misdemeanor which said misdemeanor will be punishable by a fine not exceeding five hundred dollars ($500.00) for each such violation.

Section 13. Severability. If a part of this ordinance is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this ordinance is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

RESOLUTION NO. 76-21 A

A RESOLUTION PROVIDING FOR THE ENACTMENT OF AN CROW TRIBAL COAL TAXATION CODE.

WHEREAS, the Crow Tribal Council has the inherent tribal sovereignty so the persons engaged in any business within the boundaries of the Crow Indians Reservation and derives that authority from treaty, federal statute and constitutional provisions;

WHEREAS, the Crow Tribe intends to exercise that basic inherent Tribal sovereignty to tax businesses and persons so engaged in the mining of coal belonging to the Crow Tribe.

WHEREAS, in the exercise of that inherent tribal sovereignty the Crow Tribe has enacted the following attached Ordinance purporting to tax individuals who extract cola belonging to the Crow Tribe on the Crow Indian Reservation including the mineral estate lying under the area known as the ceded strip.

THEREFORE BE IT RESOLVED that the proposed attached ordinances be adopted by the Council as a valid exercise of Crow inherent Tribal soverenignty [sic].

BE IT FURTHER RESOLVED that the taxation rate at which person illegible or engaging in the mining of Crow coal be taxed at the rate of 25% of the contract sales price or defined in the attached ordinance.

BE IT FURTHER RESOLVED that it is the express intent of the Ordinance pursuant to Section 11.1 Title 25 Code of Federal Regulations to replace or supercede [sic] involved parts of that code which may be inconsistent

with the provisions contained in the Crow Tribal Taxation Code.

BE IT FURTHER RESOLVED, that the attached taxation code upon passage by the Tribal Council is immediately forwarded directly to the Secretary of Interior pursuant to Article IV Section 10 of the Crow Constitution.

PASSED, APPROVED AND ADOPTED by the Crow Tribal Council this 31st day of January, 1976, by Unanimous votes for; no votes against passage adoption and approval.

/s/ Patrick Stands Over Bull
Patrick Stands Over Bull,
Chairman
Crow Tribal Council

ATTEST:

_____

Tyrone L. Ten Bear, Secretary
Crow Tribal Council

NOTED:

_____

Acting Superintendent
Crow Indian Agency

_____

[LOGO] WESTMORELAND RESOURCES
2705 Montana Avenue, Post Office Box 1883,
Billings, Montana 59103 (406) 248-7803

Charles E. Brinley
President

March 30, 1976

Mr. Patrick Stands Over Bull
Chairman
Crow Tribe of Indians
P. O. Box 1183
Crow Agency, Montana 59022

Dear Mr. Stands Over Bull:

This is in response to your letter of March 25 concerning a business settlement between Westmoreland Resources and the Crow Tribe in lieu of payment of the tax.

When the amended leases were negotiated between Westmoreland Resources and the Tribe, Westmoreland Resources granted to the Tribe all the financial advantages Westmoreland Resources could afford both from the point of view of its ability to price your coal competitively and from the point of view of Westmoreland's ability to earn a reasonable return on its investment. During the course of those negotiations, the Westmoreland representatives did express a willingness to pass on to the Tribe any amounts by which the burden of the expected state tax could be reduced by the exercise of whatever governmental powers the Tribe may have over the ceded strip. We stressed at that time that any additional payment to the Tribe would have to be in lieu of, rather than in addition to, the state tax. That was the only context in which the subject of a tribal tax was discussed

and we thought it was understood that the terms of the amended leases were to be the final economic settlement between us. Therefore, it is accurate that Crow taxation as an additional tax became a concern in January, 1976.

We have concluded that a business settlement between us is not a viable resolution of the present tax issue.

We suggest, however, that the Crow Tribe consider reinstituting efforts with the Montana Legislature to gain an appropriate share of the current Montana tax. Westmoreland Resources stands ready to work with you in this regard, provided that there would be no increase in the overall tax and provided that the full cost of any proposed arrangement could be passed along to Westmoreland's customers.

This will confirm that we successfully negotiated the termination of the Colorado Interstate Gas Company Option Agreement effective February 26, 1976. This termination satisfies the Tribe's objectives as expressed in section 6(f) in the Tract III lease with respect to that particular Option Agreement.

Sincerely yours,

/s/ Charles E. Brinley
Charles E. Brinley

Vice Chairman
Minerals Committee
Tribal Counsel
Coal Research Office

dlm
CC: Robert Yellowtail, Jr.
Lee Rockabove
Thomas Lynaugh
Michael Ross

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS,)
FOREST HORN, a member of the Crow Tribe and Chairman of The Crow Tribal Council,)
TED HOGAN, a member of the Crow Tribe and Secretary of the Crow Tribal Council,)
JIGGS YELLOWTAIL, a member of the Crow Tribe, and)
BARNEY OLD COYOTE, a member of the Crow Tribe,)
Plaintiffs)
v.)
THE STATE OF MONTANA,)
RAYMON DORE, Director, Montana Department of Revenue,)
MARGARET WHEELER, Treasurer, Big Horn County, Montana,)
BETTY WHALEY, Assessor, Big Horn County, Montana,)
MAY JENKINS, Treasurer, Yellowstone County, Montana,)
CREATH TOOLEY, Assessor Yellowstone County, Montana,)
KAREN VAN HAELE, Treasurer Treasure County, Montana, and)
BERNICE MOERKERKE, Assessor, Treasure County, Montana,)
Defendants)

No. CV-78-110-BLG

(Filed Sep. 29, 1978)

SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, the CROW TRIBE OF INDIANS, *et al.*, by their attorneys, bring this action against the above-named defendants and allege as follows:

JURISDICTION

1. This is a civil action for injunctive and declaratory relief. It arises under Article I, Section 8, Clause 3 of the Constitution of the United States; under the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970); under the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; under Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676; and under 42 U.S.C. § 1983. The matter in controversy, exclusive of interest and costs, exceeds the value of ten thousand dollars. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1362. Venue is established under 28 U.S.C. § 1391(b).

PARTIES

2. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of Interior. It brings this action on its own behalf and, as sovereign, on behalf of each of its members.

3. Plaintiff FOREST HORN is an enrolled member of the Tribe and Chairman of the Crow Tribal Council; he

is a resident of the Crow Reservation. He brings this action on his own behalf and, as Chairman of the Tribe's governing body, on behalf of each of the Tribe's members.

4. Plaintiff TED HOGAN is an enrolled member of the Tribe and Secretary of the Crow Tribal Council; he is a resident of the Crow Reservation. He brings this action on his own behalf and, as secretary of the Tribe's governing body, on behalf of each of the Tribe's members.

5. Plaintiff JIGGS YELLOWTAIL is an enrolled member of the Tribe; he is a resident of the Crow Reservation. He brings this action on his own behalf and on behalf of each of the Tribe's members.

6. Plaintiff BARNEY OLD COYOTE is an enrolled member of the Tribe. He brings this action on his own behalf and on behalf of each of the Tribe's members.

7. Defendant STATE OF MONTANA (hereinafter "State") is a sovereign State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

8. Defendant RAYMON DORE is Director of the Montana Department of Revenue. He is sued in his official capacity; his official address is: Department of Revenue, Sam W. Mitchell Building, Helena, Montana 59601.

9. Defendant MARGARET WHEELER is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hardin, Montana 59034.

10. Defendant BETTY WHALEY is Assessor of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hardin, Montana 59034.

11. Defendant MAY JENKINS is Treasurer of Yellowstone County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Billings, Montana 59101.

12. Defendant CREATH TOOLEY is Assessor of Yellowstone County, Montana. He is sued in his official capacity; his official address is: County Courthouse, Billings, Montana 59101.

13. Defendant KAREN VAN HAELE is Treasurer of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hysham, Montana 59038.

14. Defendant BERNICE MOERKERKE is Assessor of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hysham, Montana 59038.

STATEMENT OF THE CLAIM

15. The Constitution of the United States, Article I, Section 8, Clause 3, grants to the Congress of the United States exclusive authority over the regulation of commerce with Indian Tribes. That authority – which includes the power to tax Indians and Indian property – resides exclusively in the Congress, and only Congress can authorize a state or state-delegated body or official to exercise any portion of that power.

16. This exclusive jurisdiction was reaffirmed by the Mandan Village Treaty of August 4, 1825, 7 Stat. 266, II Kappler 244; by the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749, II Kappler 594, IV Kappler 1067; by the

Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; and by Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676, pursuant to which the defendant State was admitted to the Union. It was expressly recognized by the defendant State in Section 2 of Ordinance 1 of the 1889 Constitution of the State of Montana and is today recognized in Article I of the 1972 Constitution of the State of Montana.

17. By the Fort Laramie Treaty of 1851, the United States recognized the aboriginal title of the Crow Indians to some 38,531,174 acres of land located in the Territories of Montana and Wyoming. The Fort Laramie Treaty of 1868 drastically reduced the territory by some 30,530,764.8 acres, leaving the Crow Indians with title to some 8,000,409.2 acres. That treaty guaranteed that this remaining land "shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Crow] Indians. . . . " 15 Stat. 650, II Kappler at 1008.

18. The Crow Reservation was further reduced in size by the Act of April 11, 1882, 22 Stat. 42; by the Act of July 10, 1882, 22 Stat. 157; and by the Indian Appropriation Act of March 3, 1891, 26 Stat. 989.

19. By the Act of April 17, 1904, 33 Stat. 352, a certain portion of the Crow Reservation – known as the "ceded area" – was opened to allotment and non-Indian settlement. The mineral estate underlying the "ceded area" was never disposed of pursuant to that Act; it remains part of the Crow Reservation. Legal title to the mineral estate is vested in the United States as trustee for the plaintiff Tribe; beneficial title remains in the Tribe.

20. Congress has never authorized the defendant State of Montana to tax the property of the plaintiff Tribe held in trust by the United States, and the Tribe has never assented to such taxation. The defendant State has never amended its Constitution to assume jurisdiction of any kind pursuant to 25 U.S.C. § 1322 (1970) or the Act of August 15, 1953, Pub. L. No. 280, §§ 6, 7, 67 Stat. 588, 590.

21. In 1975, the defendant State enacted into law a statute, Ch. 525, L. 1975, Rev. Codes of Mont. §§ 84-1312 through 84-1325 (1977 Cum. Supp., v. 5, pt. 2), pursuant to which it purports to impose a severance tax "on each ton of coal produced in the state," [Rev. Codes of Mont. § 84-1314 (1977 Cum. Supp., v. 5, pt. 2)], and a gross proceeds tax upon the proceeds of all sales of coal mined in the state. [Rev. Codes of Mont. § 84-1322 (1977 Cum. Supp., v. 5, pt. 2)].

22. Defendants, Dore, Wheeler, Whaley, Jenkins, Tooley, Van Haele and Moerkerke are the state and county officials charged by Montana law with the enforcement, assessment and collection of the Montana coal severance and gross proceeds taxes.

23. There are approximately 6,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. The Crow people to date have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status.

The development of tribal coal offers an unprecedented opportunity for the Crow people to improve their economic situation.

24. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying considerable amounts of the Crow Reservation, including the "ceded area." In all, the plaintiff Tribe is the beneficial owner of approximately six billion tons of coal.

25. Because the United States holds the Crow tribal lands, including the Crow coal resources in trust for the Tribe, it manages and supervises those trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

26. Since 1967, pursuant to the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123, the United States Secretary of the Interior and the Commissioner of the BIA (now the Assistant Secretary of the Interior for Indian Affairs) have actively recommended, advised and approved transactions which have brought the Crow coal resources close to a point of massive development. In bringing these transactions about, the general practice of the Department of the Interior and the BIA since 1968 has been to (i) advertise for bids for two-year prospecting permits; (ii) recommend and approve two-year permits, containing exclusive options to lease, to successful bidders; (iii) recommend and approve two-year extensions of the permits with options to lease, as requested by permittees; and (iv) recommend and approve conversion of the permits into coal mining leases.

27. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale of prospecting permits covering Crow coal underlying 34,671 acres. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. Westmoreland is the only lessee currently mining Crow coal.

28. The BIA has also approved prospecting permits on the Crow Reservation to Gulf Oil Company, Peabody Coal Company, Shell Oil Company (hereinafter "Shell"), and American Metal Climax, Inc. (hereinafter "AMAX"). It has approved renewals of all those permits for two years. Additionally, it has approved the conversion of the Shell and AMAX permits into leases. The validity of the BIA's approval of those permits and leases is currently the subject of litigation in Crow Tribe of Indians v. Andrus, CV-76-10-BLG, D. Mont. (Billings Division).

29. The plaintiff Tribe is also the beneficial owner of other extensive coal deposits which it has not yet undertaken to develop. One such deposit underlies that portion of the reservation proper commonly known as the "reserve area."

30. On January 31, 1976, the plaintiff Tribe enacted its own tribal coal taxation code, which imposes upon persons mining Crow coal a severance tax of 25 percent of the value of Crow coal mined by such persons, including the lessees identified in paragraphs 27 and 28 of this

Complaint. On January 17, 1977, the Secretary of the Interior approved the Crow taxation code to the extent that it applied to coal underlying the Crow Reservation proper.

31. On March 3, 1978, the Assistant Secretary of the Interior disapproved, on procedural grounds, an amendment to the Crow Constitution which would have had the effect of applying the tribal tax ordinance to the removal of coal underlying the "ceded area." The plaintiff Tribe has undertaken to comply with all procedural requirements, and will soon amend its Constitution so as to extend its tax ordinance to embrace all Crow coal underlying the "ceded area." Approval of the Tribe's taxation of "ceded area" coal will be sought immediately thereafter.

32. The Crow tribal severance tax, enacted in an exercise of the Tribe's sovereignty and approved by the Secretary of the Interior pursuant to congressionally delegated authority in the implementation of federal policy, preempts state taxation of the subject coal.

33. Pursuant to Section 84-1315 of the Revised Codes of Montana, Westmoreland – the only lessee actively mining Crow coal – has, since 1975, computed and paid on a quarterly basis the state severance tax imposed by Section 84-1314. Because the Westmoreland mining operation involves surface mining of high-quality coal, it has been required by the defendant State to pay a tax equal to 30 percent of the value of all Crow coal it has mined. Through March 31, 1978, Westmoreland paid $15,481,262.23 in severance taxes to the defendant State.

In that same period of time, Westmoreland paid only $5,524,638.68 to the plaintiff Tribe in royalties.

34. Since 1976, Westmoreland also has reported (on an annual basis) gross proceeds from its sales of Crow coal, pursuant to Section 84-1320 of the Revised Codes of Montana, and has paid (also on an annual basis) the gross proceeds tax imposed by Section 84-1322 of the Revised Codes of Montana. At the present time, plaintiffs are without knowledge of the amounts of gross proceeds taxes Westmoreland has been required to pay on the proceeds from its sales of Crow coal.

35. The imposition, assessment and collection of the 30-percent state severance tax and the gross proceeds tax have imposed a direct and severe burden upon the plaintiff Tribe in that the taxes are a direct and major cost associated with the production of Crow coal by Westmoreland.

36. The natural and immediate consequences of the imposition, assessment and collection of these taxes have been: (i) drastically increased costs to purchasers of Crow coal; (ii) a correspondingly severe restriction upon the amount of royalty payments which Westmoreland has been willing to pay to the plaintiff Tribe under its leases; and (iii) the frustration of efforts by the Tribe to renegotiate its leases with Westmoreland. The state severance and gross proceeds taxes have already adversely affected the competitive status of Crow coal, and, when taken in conjunction with the Crow tribal tax, may increase the cost of Crow coal so drastically as to render that coal noncompetitive in the marketplace and thereby threaten to preclude further Crow coal development.

37. The existence of the 30-percent state severance tax and the gross proceeds tax has frustrated efforts by the Tribe to negotiate (or renegotiate) leases with the other Crow permittees and lessees – Shell, Peabody, Gulf, and AMAX – and has severely depressed the amount of royalties which those permittees and lessees are willing and able to pay to the Tribe under any such leases or pursuant to other arrangements.

38. The existence. of the 30-percent state severance tax and the gross proceeds tax has also frustrated efforts by the Tribe to offer permits and leases covering additional coal deposits in the "reserve area" and elsewhere on the reservation. It has also rendered the Tribe incapable of entering into any fair arrangements for the development of tribal coal or of developing its own coal pursuant to mining contracts with persons capable of performing the actual mining of such coal.

39. The imposition, assessment and collection of the 30-percent state severance tax and the gross proceeds tax upon Crow coal held in trust by the United States have: (i) illegally subjected the property of the sovereign Crow Tribe to an unauthorized state tax, in violation and/or derrogation of Article I, Section 8, Clause 3 of the United States Constitution; the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; and Section 4 of the Enabling Act of February 22, 1889, 22 Stat. 676; (ii) illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of

their land, thereby depriving them of liberty and property without due process of law, in violation of the fourteenth amendment of the United States Constitution and of the Tribe's civil rights and the civil rights of its members; (iii) illegally threatened the ability of the sovereign Crow Tribe to exercise its sovereignty through its lawful tribal tax; (iv) illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people; and (v) illegally and severely impaired the ability of the sovereign Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services.

40. Prior to and since the enactment of the challenged tax laws, Crow tribal representatives, by correspondence and by testimony before the Montana legislature, have consistently protested the imposition of these unlawful taxes upon Crow coal, to no avail.

41. Plaintiffs are without recourse to any remedies other than those sought by this Complaint and, unless such relief is granted, they will continue to suffer immediate and irreparable injury.

WHEREFORE, plaintiffs demand judgment

1. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe, and a gross proceeds tax upon the sale of such coal, are violative of Article I, Section 8, Clause 3

of the United States Constitution and are therefore unconstitutional, null and void;

2. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, deprive the Tribe and its members of rights secured to them by the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123, and are therefore null and void;

3. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severence tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, deprive the Tribe and its members of rights and property secured to them by the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008, and are therefore null and void;

4. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, are violative of Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676, and are therefore null and void;

5. Declaring that the defendants' imposition, assessment and collection of an unconstitutional and illegal

severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, pursuant to Sections 84-1312 through 84-1325 of the Revised Codes of Montana, deprive the Tribe and its members of liberty and property without the protection of due process of law, in violation of the fourteenth amendment of the United States Constitution and in violation of the civil rights of the plaintiffs and other members of the plaintiff Tribe;

6. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, (i) unlawfully impair the right of the plaintiff Tribe to self government and (ii) are preempted by the Tribe's own lawfully enacted severance tax, and are therefore null and void;

7. Enjoining the defendants, their agents, servants, employees, and attorneys from enforcing and/or taking any action pursuant to Sections 84-1312 through 84-1325 of the Revised Codes of Montana which would result directly or indirectly in the imposition, assessment or collection of a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe or a gross proceeds tax upon the sale of such coal;

8. Ordering that the defendants pay to the plaintiffs the costs of this litigation, including attorneys' fees; and

9. Awarding to the plaintiffs such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Richard Anthony Baenen
Richard Anthony Baenen

/s/ Edward M. Fogarty
Edward M. Fogarty

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(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al.	:	CIVIL ACTION
	:	
v.	:	NO. CV-78-110-Blg
	:	
THE STATE OF MONTANA, et al.	:	
	:	

PROPOSED ANSWER OF INTERVENING DEFENDANT WESTMORELAND RESOURCES, INC. TO PLAINTIFFS' SECOND AMENDED COMPLAINT, INCLUDING COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFFS, AND CROSS-CLAIM FOR INJUNCTIVE AND DECLARATORY RELIEF AGAINST DEFENDANTS

Westmoreland Resources, Inc. ("Westmoreland") proposes the following answer to plaintiffs' Second Amended Complaint:

1. Admitted that this Court has jurisdiction over this controversy and that venue is proper. It is further averred that this Court has pendent and ancillary jurisdiction.

2-18. Admitted as to statements of fact, except denied that the Tribe has all the attributes of sovereignty, denied that it has any sovereign or governmental authority in the Ceded Area, and denied that it has any sovereign or governmental authority to tax Westmoreland or its activities. To the extent that plaintiffs aver conclusions of law, no answer is required.

19. Admitted, except that Westmoreland denies that the mineral estate underlying the "Ceded Area" remains a part of the Crow Reservation and is without knowledge or information sufficient to form a belief as to whether or not the mineral estate underlying the "Ceded Area" was disposed of pursuant to the Act of April 27, 1904. Pursuant to the said Act, the Ceded Area ceased to be a part of the Crow Reservation and the Tribe and its members relinquished any and all sovereign or governmental authority over the Ceded Area where Westmoreland leases and mines coal.

20. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 20 of plaintiffs' Second Amended Complaint.

21-22. Admitted.

23. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 23 of plaintiffs' Second Amended Complaint.

24. Denied that the Ceded Area where Westmoreland leases and mines coal is a part of the Crow Reservation or that the Tribe or its members have any sovereign or governmental jurisdiction over it. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averment concerning the amount of coal in which the Tribe and its members have a beneficial interest. Otherwise admitted.

25. Admitted that the United States holds in trust for the Tribe and its members minerals underlying the

Ceded Area where Westmoreland leases and mines coal. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 25 of plaintiffs' Second Amended Complaint.

26. Admitted that the United States Secretary of Interior and the Commissioner of the BIA (now the Assistant Secretary of Interior for Indian Affairs) have actively recommended, advised and approved transactions which have brought the Crow coal resources in which Westmoreland has an interest close to a point of massive development, pursuant to the Mineral Leasing Act of 1938, as amended. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 26 of plaintiffs' Second Amended Complaint.

27. Admitted.

28-29. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 28 and 29 of plaintiffs' Second Amended Complaint.

30. Admitted that the Tribe and its members enacted their own tribal coal taxation code on or about January 31, 1976 which purported to subject Westmoreland to a coal severance tax. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 30 of plaintiffs' Second Amended Complaint.

31. Admitted that on or about March 3, 1978, the Assistant Secretary of Interior disapproved, on procedural grounds, an amendment to the Crow Constitution which purports to have the effect of applying the tribal taxation ordinance to the removal of coal underlying the Ceded Area. Further admitted that the Tribe and its members will undoubtedly seek to comply with all procedural requirements; will undoubtedly soon seek to amend their Constitution so as to extend the Tribal tax ordinance to embrace all coal underlying the Ceded Area; and will undoubtedly seek approval of their taxation of ceded area coal immediately thereafter.

32. Admitted that the Secretary of the Department of Interior exercises certain Congressionally delegated authority over the leasing of Indian lands for mining purposes. Westmoreland denies that the Tribe or its members have any authority, sovereign or otherwise, to enact a coal tax applicable to Westmoreland or its mining activities in the Ceded Area, whether or not the Ceded Area is part of the Reservation. Westmoreland further denies that the Secretary of Interior has any authority to approve a tribal coal tax insofar as it applies to Westmoreland.

33. Denied that the royalty payments to the Tribe for the period in question have been $5,524,638.38. On the contrary, the amount paid for that period has been some $5,684,834 and the amount paid through May 31, 1978 has been some $6,240,039. Denied to the extent plaintiffs are alleging that the coal is of any higher quality than subbituminous. Otherwise admitted.

34. Admitted, except that Westmoreland is without knowledge of information sufficient to form a belief as to

the knowledge, if any, of plaintiffs to the amounts of gross proceeds taxes paid by Westmoreland.

35. Admitted that the state severance tax is a direct and major cost associated with its production of Crow coal. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 35 of plaintiffs' Second Amended Complaint.

36. Admitted that the imposition, assessment and collection of the state severance tax has drastically increased costs to purchasers of the coal that is mined by Westmoreland in the Ceded Area. Further admitted that the state severance tax and gross proceeds tax have already adversely affected the competitive status of the Crow coal mined by Westmoreland, and that, when taken in conjunction with any Crow Tribal tax, will increase the cost of the Crow coal mined by Westmoreland so drastically as to render the coal non-competitive in the market place, thereby undoubtedly precluding further development of this coal by Westmoreland. Otherwise denied.

37-38. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 37 and 38 of plaintiffs' Second Amended Complaint.

39. Admitted to the extent paragraph 39 of the Second Amended Complaint alleges that the state severance tax and gross proceeds tax are illegal because they interfere with and upset the Federal government's comprehensive regulatory scheme governing the leasing for mining purposes of lands in which Indians have an interest. Denied to the extent paragraph 39 of the Second

Amended Complaint alleges that the state severance tax and gross proceeds tax on Westmorelands coal mining operations in the Ceded Area are illegal because the Ceded Area is a part of the Reservation or because Westmoreland's mining operation is subject to any authority of the Tribe and its members to tax. Otherwise, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 39 of plaintiffs' Second Amended Complaint.

40-41. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs 40 and 41 of plaintiffs' Second Amended Complaint.

First Affirmative Defense

Plaintiffs are barred by collateral estoppel and res judicata from asserting any claim that the Ceded Area, where Westmoreland mines and leases coal, is part of the Crow Reservation.

Second Affirmative Defense

Plaintiffs are barred by contract, by estoppel, and by the equal protection and due process provisions of the Indian Civil Rights Act from any claim that they have authority to tax Westmoreland or its mining activities.

Third Affirmative Defense

Plaintiffs have no authority, sovereign or otherwise, to tax Westmoreland or its mining activities in the Ceded Area.

WHEREFORE, intervening defendant Westmoreland respectfully requests that the relief sought by plaintiff Tribe and its members be denied, to the extent that said relief is premised on any allegation or contention: that the Ceded Area, where Westmoreland has coal leases and is mining coal, is a part of the Reservation; or that the Tribe and its members have power or authority to tax Westmoreland or its mining activities in the Ceded Area.

COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFFS

The allegations of paragraphs 1 through 14 of plaintiffs' Second Amended Complaint and the answers thereto of intervening defendant Westmoreland Resources, Inc. ("Westmoreland"), are incorporated herein by reference.

2. Westmoreland is a Delaware corporation, with its principal place of business in Billings, Montana, and is the successor to Westmoreland Resources, a partnership. It is engaged in the production and sale of coal on what is known as the Ceded Strip or Ceded Area, near Hardin, Montana and north of the Reservation of the plaintiff Crow Tribe of Indians ("Tribe").

3. Westmoreland is a non-Indian entity.

4. On June 6, 1972, Westmoreland entered into leases with the Tribe for the mining of coal underlying

some 30,876 acres of land in the Ceded Area (the "leases"). Pursuant to 29 C.F.R. Part 171, these leases were approved by the Secretary of Interior as trustee for the Tribe and its members, who have a beneficial, but not a governmental or sovereign, interest in the mineral rights underlying said land.

5. The leases were amended on November 26, 1974 to provide for substantial increases in the royalties paid to the Tribe. They were approved by the members of the Tribe and by the Secretary of Interior and are presently in effect.

6. As of May 31, 1978, Westmoreland has paid some $6,240,039 to the Tribe in royalties.

7. Subsequent to execution of the amended leases, defendant State of Montana (the "State") enacted a coal severance tax and a gross proceeds tax which require Westmoreland to pay to the State and to Big Horn County, Montana approximately 26% of the f.o.b. mine price of the coal produced under its leases with the Tribe. §84-1312, et seq., R.C.M. (1977 Cum. Supp., v. 5, pt. 2).

8. Westmoreland has paid Montana some $15,481,262 to the State in coal severance taxes since the tax was first imposed on July 1, 1975, and some $1,707,320 to Big Horn County, Montana in gross proceeds taxes since that tax was first collected in 1976. The payment of coal severance taxes to the State for the quarter ending March 31, 1978 made under protest pursuant to §84-4502, R.C.M. 1947.

9. As set forth in plaintiffs' Second Amended Complaint, ¶¶ 30 and 31, the Tribe and its members are

actively taking steps toward the imposition of a coal severance tax of 25% on the value of the coal being mined by Westmoreland under the amended leases. If both the Indian and Montana taxes were in effect, Westmoreland would be required to pay at the confiscatory rate of at least 55%.

10. The Ceded Area, and the coal lying beneath it, were once, but are not presently, a part of the Crow Reservation.

11. In 1899 the Tribe and the Department of Interior negotiated an agreement that ceded all right, title and interest in these lands, to the United States. This agreement, as amended, was subsequently adopted by Congress as the Cession Act of April 27, 1904, 33 Stat. 352, and terminated the sovereign governmental authority of the Tribe and its members over the area, including its subsurface mineral rights. This statute left the Tribe and its members with only a beneficial proprietary interest in the mineral rights underlying the Ceded Area.

12. Since 1904, the Tribe and its members have never exercised or attempted to exercise any sovereign or governmental authority over the surface of the Ceded Area or more particularly over the approximately 30,876 acres of the Ceded Area where Westmoreland is mining coal or has leases to mine coal.

13. Since 1904, the Tribe and its members have (a) *never* exercised or attempted to exercise any police power with respect to the Ceded Area; (b) *never* regulated or attempted to regulate the sale or consumption of liquor in the Ceded Area; (c) *never* established or attempted to establish electoral districts encompassing the Ceded

Area; and (d) *never* exercised or attempted to exercise any authority or control over fishing and hunting in the Ceded Area.

14. Since 1904, the Tribe and its members have never exercised or attempted to exercise any sovereign or governmental authority over the subsurface of the Ceded Area, except for their recent attempt to tax Westmoreland's mining activities there.

15. The Tribe's Constitution does not presently and has never specifically referred or applied to the Ceded Area.

16. Since the interest of the Tribe and its members in the mineral rights underlying the Ceded Area is simply beneficial or proprietary in nature and carries with it no sovereign or governmental authority, the Tribe and its members have no power to impose a severance tax on Westmoreland's coal mining operations on or underlying these lands.

17. The Tribe and its members have no right to impose any tax upon Westmoreland, whether or not the Ceded Area is part of the Reservation, since the Tribe and its members have no power or authority to tax a non-Indian entity such as Westmoreland, wherever located.

18. The negotiations between the Tribe and Westmoreland for substantially increased royalties, which culminated in the amended leases of November 26, 1974, also resulted in a Settlement Agreement of that date, which was approved by the Secretary of Interior and by the members of the Tribe.

19. Under paragraph 4(b) of this Settlement Agreement and in the Tribal resolution approving the amended leases and Settlement Agreement, the Tribe and its members agreed that the Settlement Agreement "provides the financial, economic, and social protections that the Tribe deems necessary."

20. The Tribe and its members are therefore barred by contract, by principles of estoppel, and by the due process and equal protection provisions of the Indian Civil Rights Act, 25 U.S.C. §1301-03 from imposing any taxes on Westmoreland or its mining activities.

21. The plaintiffs are further barred by principles of collateral estoppel and res judicata from litigating the status of the Ceded Area, since in previous judicial proceedings in which the Crow Tribe was a party, it was determined that the Ceded Area is not part of the Reservation.

22. The question as to whether the Ceded Area is a part of the Reservation and whether Westmoreland and its mining operations are subject to any taxing authority of the Tribe and its members as well as the question of the State's authority to impose a coal severance tax or gross proceeds tax on Westmoreland have been put in issue, in this lawsuit, by the allegations of plaintiffs' Second Amended Complaint.

23. Any ruling that the Ceded Area is part of the Reservation would cause Westmoreland irreparable harm, in that it would materially advance the stated intention of the Tribe and its members to impose a burdensome tax on Westmoreland's mining operations in the

Ceded Area and could lead to confiscatory double taxation.

24. Any ruling that the Tribe can tax Westmoreland would likewise cause it irreparable harm.

25. Westmoreland has a vital interest, as lessee of Ceded Area land and mineral rights and as a company mining coal there, in the authority of the Tribe and its members to impose taxes upon it.

26. Westmoreland has no adequate remedy at law.

WHEREFORE, Westmoreland requests this Court:

(a) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that the Ceded Area, both surface and subsurface, where it has coal leases and is mining coal, is not part of the Reservation;

(b) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that the Tribe and its members have no power or authority to tax Westmoreland or its mining activities in the Ceded Area;

(c) to grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

CROSS-CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST DEFENDANTS

COUNT I

1-26. The allegations of paragraphs 1 through 26 of intervening defendant Westmoreland Resources, Inc.'s ("Westmoreland") Counterclaim for Declaratory Relief Against Plaintiffs, are incorporated herein by reference.

WHEREFORE, Westmoreland prays the Court:

(a) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that the Ceded Area, both surface and subsurface, where it has coal leases and is mining coal, is not part of the Reservation;

(b) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that the Tribe and its members [sic] have no power or authority to tax Westmoreland or its mining activities in the Ceded Area;

(c) to grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

COUNT II

1. The allegations of paragraphs 1 through 6 of Westmoreland's Counterclaim for Declaratory Relief Against Plaintiffs, are incorporated herein by reference.

2. Defendant State of Montana (the "State") has enacted a coal severance tax and a gross proceeds tax which require Westmoreland to pay to the State and Big Horn County, Montana approximately 26% of the f.o.b. mine price of the coal produced under its leases with plaintiff Crow Tribe of Indians (the "Tribe"). §84-1312, et seq., R.C.M. 1947.

3. Westmoreland has paid Montana some $15,481,262 to the State in coal severance taxes since the tax was first imposed on July 1, 1975, and some $1,707,320 to Big Horn County, Montana in gross proceeds taxes since that tax was first collected in 1976. The payment of coal severance taxes to the State for the

quarter ending March 31, 1978 was paid under Protest pursuant to §84-4502 R.C.M. 1947.

4. On June 20, 1978, various utilities and coal producers, including Westmoreland, filed suit in the District Court for the First Judicial District of Montana challenging the State's coal severance tax as violative of the interstate commerce clause of the U.S. Constitution and on certain preemption grounds. *Commonwealth Edison Co., et al. v. State of Montana, et al.*, No. 42657, filed in the District Court for the First Judicial District of the State of Montana, in and for the County of Lewis and Clark (the "State court suit").

5. Since Westmoreland is the only plaintiff in the State court suit which is mining coal under a lease with an Indian Tribe and since the Tribe is not a party to that action, Westmoreland has not contended therein that the State coal severance tax is invalid for the reasons set forth below, since these reasons are peculiarly applicable to the situs of Westmoreland mining on land as to which the Tribe or its members have a beneficial interest.

6. The Tribe and its members have a beneficial interest in the coal being mined by Westmoreland underlying the Ceded Area.

7. The leasing of lands owned by the Tribe and its members for mining purposes, whether or not the land is part of the Crow Reservation, is subject to the plenary power of Congress over Indian tribes and the power of Congress to regulate commerce with Indian tribes.

8. Pursuant to these powers, Congress has passed a comprehensive regulatory scheme that governs the leasing of Indian-owned land for mining purposes, and for oil and gas production, even though that land is not part of a reservation. This regulatory scheme governs what can be mined, how, and at what compensation to the Indians.

9. All operations under any oil, gas, or mineral lease issued pursuant to any act affecting restricted Indian lands are subject to the rules and regulations of the Department of the Interior. 25 U.S.C. §396(d). The regulations issued by the Department of the Interior govern, among other things, acreage limitations for any one lease, the terms of the lease, royalty payments, the time and manner of royalty payment, diligence in drilling or mining, and the prevention of waste, restriction on operations, penalties assignments and overriding royalties and inspection of records. *See* 25 C.F.R. §§171-184. All leases must be approved by the Department of the Interior.

10. The regulatory scheme also encompasses the circumstances under which states can impose taxes on mining operations. In 1924, Congress specifically provided that oil and gas production on certain unalloted Indian lands could be taxed by the state in which the lands were located. 25 U.S.C. §§398, 401. When Congress passed the act which governs the leases executed by the Crow Tribe and Westmoreland, in 1938, no consent was given for state taxes on mining leases or operations. 25 U.S.C. §396(a) et seq.

11. Mining on the Ceded Area, although not a part of the Crow Reservation, comes within the aforesaid regulatory scheme of the federal government. Westmoreland entered into these leases pursuant to 25 C.F.R. Part 171.

12. The State's coal severance tax and gross proceeds tax, §84-1312 et seq., R.C.M. (1977 Cum. Supp., v. 5, pt. 2), as they are applied to Westmoreland's mining operation in the Ceded Area, are barred under the Supremacy Clause of the United States Constitution, and the Doctrine of Pre-emption.

13. The grounds for challenging the State's coal severance tax which were set forth in the State lawsuit provide additional grounds for invalidating the State's taxes as they apply to Westmoreland and its mining operation.

14. The State's coal severance tax and gross proceeds tax have and will continue to cause Westmoreland irreparable harm.

15. Westmoreland has no adequate remedy at law.

WHEREFORE, Westmoreland requests the Court:

(a) to enter a declaratory judgment, pursuant to 28 U.S.C. §2201, et seq., that defendants have no power to impose the State's coal severance tax and gross proceeds tax on Westmoreland with respect to its mining operation in the Ceded Area;

(b) to enjoin defendants from imposing or collecting the State's coal severance tax and gross proceeds tax on coal from Westmoreland with respect to its mining operation in the Ceded Area; and

(c) to grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

/s/ R. H. Bellingham
Bruce L. Ennis
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/s/ Harvey Bartle, III
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Attorneys for Intervening Defendant Westmoreland Resources, Inc.

DATED: October 5, 1978

CERTIFICATE OF SERVICE

I, R. H. BELLINGHAM, Attorney for Westmoreland Resources, Inc. hereby certify that copies of the foregoing PROPOSED ANSWER OF INTERVENING DEFENDANT WESTMORELAND RESOURCES, INC. TO PLAINTIFFS' SECOND AMENDED COMPLAINT INCLUDING COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFFS, AND CROSS-CLAIM FOR

INJUNCTIVE AND DECLARATORY RELIEF AGAINST DEFENDANTS, were mailed, postage prepaid, this 5th day of October, 1978, to the following persons:

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/s/ R. H. Bellingham
R. H. BELLINGHAM

AGREEMENT

COAL MINING

CROW INDIAN RESERVATION

This Agreement is made and entered into on this 8th day of May, 1980, between the CROW TRIBE OF INDIANS, Crow Agency, Montana 59022, hereinafter called "Tribe", and SHELL OIL COMPANY, P. O. Box 2099, Houston, Texas 77001, hereinafter called "Shell". The Tribe and Shell are sometimes referred to individually as "Party" and collectively as "Parties".

WITNESSETH:

WHEREAS, in 1968, as a result of a competitive sale, Shell acquired a Prospecting Permit from the Tribe authorizing Shell to prospect for coal on certain lands described therein for a term ending June 5, 1970. By Extension Agreement dated July 21, 1969, the term was extended through June 5, 1972; and

WHEREAS, the Tribe, as Lessor, executed and delivered to Shell, as Lessee, a Coal Mining Lease dated June 5, 1972, which was approved by the Superintendent on June 8, 1972, which Coal Mining Lease covered 30,247.68 acres, more or less, located within the Crow Indian Reservation in Big Horn County, Montana; and

WHEREAS, in reliance on this lease Shell initiated development activities and executed coal sales contracts; and

WHEREAS, by Resolution dated July 13, 1974, the Tribe, acting through the Crow Tribal Council, declared that all coal mining leases, whether existing or pending,

are unlawful, null and void and are not binding on the Tribe; and

WHEREAS, there is pending in the United States District Court for the District of Montana Civil Action No. CV 76-10 in which the Tribe, as Plaintiff, asked the

* * *

Article 18 Crow Sovereignty

18.01 General Principles

18.01.01 Shell recognizes the sovereignty of the Tribe as established by Federal law, and the Tribe's ability to legislate in certain areas affecting Mining Activities on the Reservation. Shell specifically acknowledges the authority of the Tribe to enact Tribal legislation relating to Mining Activities, including the Tribal Employment Rights Ordinance, the Health and Sanitation Code and the Land Use Zoning Code. The Parties recognize that the responsibilities of the Tribe as a sovereign include but are not limited to the protection of the health and general welfare of the Tribe and its members, the quality of the environment, the protection and conservation of Tribal resources as well as those responsibilities that eminate [sic] from unique cultural interests. The Tribe recognizes the competitive nature of mining and the need for Coal mined on the Reservation ("Crow Coal") to be competitive in the marketplace with other Coal mined or to be mined off the Reservation within Montana pursuant to Federal or State leases ("Montana Coal"). The Tribe may adopt laws that impose reasonable additional costs so long as the total of

all externally imposed costs associated with Mining Activities (excluding the cost of Shell's regular staff required for reporting to the Tribe as a government) whether imposed by the Tribe, the United States, the State or local government ("Governmental Costs") will not exceed the Governmental Costs associated with the mining of Montana Coal. Also while making no representation as to the quality, quantity or location of any Coal reserves subject to this Agreement, the Tribe agrees they will take no action which precludes Shell from mining Crow Coal covered by this Agreement which otherwise could be mined under State or Federal law, nor will the Tribe enact any law, ordinance, or regulation ("Law") which would conflict with Shell's rights under this Agreement. The Tribe will not unreasonably withhold or delay any licenses, permits, or other concurrences required by a Law enacted by it.

18.01.02 If, in the exercise of its sovereignty, the Tribe enacts any Law which it expects Shell, or anyone doing business with Shell, to comply with, the Commission will notify Shell in writing of such Law and provide Shell with a copy thereof. If Shell then believes or later determines that such a Law (a) may cause, or is causing, the Governmental Costs of mining Crow Coal to exceed Governmental Costs which would be associated with the mining of Montana Coal not covered by such Law, or (b) may preclude, or is precluding, Shell from mining Crow Coal covered by this Agreement which otherwise could be mined under State and Federal law, then Shell shall notify the Commission in writing of the basis for Shell's belief. Shell and a committee of the Commission shall thereafter meet within 30 days after the Commission's receipt of Shell's

notice to discuss the matter. If, after that meeting, Shell maintains its position and the Commission does not amend or modify the Law to remove Shell's objection, then either Party may at any time submit the matter to arbitration. Shell's compliance with a Law shall not constitute a waiver of its right to challenge such Law under this Article. It is not the purpose of this Article to waive Shell's obligation to comply with any lawful Law except to the extent provided herein.

18.02 Tribal Tax. On Coal Delivered pursuant to this Agreement, Shell will pay the Crow Tribe an amount equal to the Montana State severance tax existing at the time (currently 30 percent of sales price excluding taxes based on production) less whatever is required to be paid to the State of Montana.

18.03 Disputes as to Cost. The arbitrators shall be empowered to find whether the Law causes the Governmental Costs of mining Crow Coal to exceed costs which would be applicable if the mining were not covered by the Law, and to determine to what extent the Law so increases costs. Shell will not have to comply with any Law except to the extent compliance, as found by the arbitrators, will not increase the Governmental Costs of mining Crow Coal over costs which would be applicable if the Law did not apply. In determining whether the Law causes the Governmental Costs of mining Crow Coal to exceed what they would be if the mining were of Montana Coal, the arbitrators shall be guided in their decision by comparing the Governmental Costs applicable to Crow Coal with the Governmental Costs applicable to Montana Coal. Such costs shall be those applicable to all Mining Activities, and shall cover all costs, including but not limited to costs such as taxes, fees,

operating expenses, safety requirements and reclamation costs. In making their comparisons the arbitrators shall take into account all relevant factors they consider reasonable and necessary to permit a valid comparison of the Governmental Costs on disparate mining operations. In addition, the arbitrators may consider any savings or reduction in Governmental Costs of mining Crow Coal which have resulted from the passage of other Laws.

18.04 Disputes as to Reserves. In determining whether the Law precludes Shell from mining Crow Coal covered by this Agreement which otherwise could be mined under State and Federal law, the arbitrators shall compare the Law with the governmental restrictions imposed on the mining of Montana Coal which preclude the recovery of Coal reserves. If the arbitrators determine that the Law precludes Shell from mining Crow Coal which would not be precluded if it were Montana Coal, Shell will not be subject to the Law to the extent that it is more preclusive.

18.05 Jurisdictional Disputes. If Shell should in good faith question any Law on the basis that the Tribe does not have jurisdiction to pass such Law, Shell may refuse to comply with such Law until the Tribe obtains a ruling from an appropriate State of federal court to the effect that the Tribe does have such jurisdiction. If Shell is in good faith complying with a State law affecting its Mining Activities on the Reservation and the Tribe believes the State lacks jurisdiction to impose such law, Shell may comply with such law until the Tribe obtains a ruling from an appropriate State or federal court to the effect that the State lacks such jurisdiction.

Article 19 Use of Coal by Members of Tribe

Reasonable supplies of Coal will be made available at no charge at the mine for domestic use by Crow Indians. No royalty or Tribal taxes or fees will be due or payable by Shell for any Coal so used. Pickup of the Coal will be from a safe area and at times which do not unreasonably interfere with Mining Activities.

4/8/82

Fredericks & Pelcyger
ATTORNEYS AT LAW
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MEMORANDUM IN SUPPORT OF CROW TRIBE'S AUTHORITY TO IMPOSE A SEVERANCE TAX ON TRIBALLY OWNED COAL MINED FROM THE "CEDED AREA"

INTRODUCTION

The Crow Tribe of Indians enacted a 25% severance tax on January 31, 1976 that applies to all of the Tribe's coal resources, including the Tribe's coal in the so-called ceded strip. Following the Secretary of the Interior's review, the tax is now in effect for the coal within the reservation boundaries.

At the time the Tribe's tax was enacted, Article VI, §10 of the Tribe's Constitution provided that the Tribe, "shall have the power to levy, assess, and collect taxes and license fees upon *non-members of the Crow Tribe doing business within the boundaries of the Crow Indian Reservation.*" [Emphasis added.] Based on this geographical limitation in the Tribe's Constitution, the Tribe's severance tax has not been applied to coal mined by Westmoreland Resources under lease from the Crow Tribe from the area that is generally known as "the ceded strip." During the period from 1976 to the present, Westmoreland has been the only producer of Crow coal. It has paid the State of Montana approximately $35,000,000.00 in severance taxes. During this same period, Westmoreland paid the

Crow Tribe approximately $12,000,000.00 in royalties. If the Tribe's severance tax had been in effect during this period, the Tribe would have collected approximately $29,000,000.00 in additional revenues from Westmoreland.

In 1978, the Crow Tribe sued the State of Montana claiming that Montana's severance tax is invalid as applied to all tribally owned coal, both within the reservation and in the ceded strip. The suit was dismissed by the district court. *Crow Tribe v. Montana*, 469 F. Supp. 154 (D. Mont. 1979). The Tribe appealed and was supported by the United States as *amicus curiae*. In July, 1981, the Court of Appeals held that Montana's tax on Crow coal would be invalid if the Tribe proves at a subsequent trial that Montana's tax prevents the Tribe from receiving a large portion of the economic benefits of its coal, that the state's tax has the effect of regulating the Tribe's mineral resources, and that the state's tax substantially affects the Tribe's ability to provide governmental services. *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981). The Court of Appeals expressly stated its belief that after a trial Montana's tax will ultimately be found invalid as applied to Crow owned coal in both the reservation and the ceded area. 650 F.2d at 1114. Significantly, the decision of the Court of Appeals regarding the validity of Montana's tax was not predicated on whether or not the Tribe had or has a comparable tax. *See*, 650 F.2d at 1115-16. Under the Ninth Circuit's decision, the validity of invalidity of Montana's tax will turn on other matters.

The Crow Tribe has adopted an amendment to its Constitution that authorizes the application of its severance tax to the Tribe's coal in the ceded strip, including

the coal now being mined by Westmoreland. The Interior Department is now considering whether to approve this amendment. It must be approved before the Tribe's tax on ceded strip coal can become effective.

Questions have been raised concerning the authority of the Crow Tribe to impose a severance tax on its coal in the ceded strip. The purpose of this Memorandum is to respond to those questions and to demonstrate that the Tribe does have the authority to tax the severance and production of that coal.

For purposes of this Memorandum, we assume the the ceded strip is no longer included in the Crow Reservation and that the Tribe lacks general jurisdiction over the surface lands in the ceded area. *See, Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981).

* * *

V

APPROVAL OF THE AMENDMENT TO THE TRIBAL CONSTITUTION WHICH WOULD ENABLE THE TRIBE TO TAX ITS CEDED STRIP COAL WOULD FULFILL THE GOVERNMENT'S TRUST OBLIGATION

The government acts in a fiduciary capacity with respect to the Crow Tribe's property rights held in trust by the United States. *Mason v. United States*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97; *United States v. Michigan*, 653 F.2d 277, 278-79 (6th Cir. 1981), *cert. denied*, ___ U.S. ___; *Nance v. EPA*, 645 F.2d 701, 710-11 (9th Cir. 1981, *cert. denied*, ___ U.S. ___; *Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980).

Thus, in considering whether to approve the amendment to the Tribe's Constitution which would authorize the imposition of a severance tax on ceded strip coal, the Secretary of the Interior is required to act in a manner that will advance and protect the Tribe's best interests. While the Secretary is bound by all applicable legal constraints, he is *not* an impartial judge or decision-maker. He is rather the Tribe's advocate and protector. As recently stated by the Supreme Court's Special Master, "[T]he trustee's duty is not to decide what is *fair*, his duty is to present the *best* case for his Indian wards." E.P. Tuttle, Report of the Special Master, *Arizona v. California*, U.S. Sup. Ct. No. 8 original, 48-49 (February 22, 1982), emphasis in original.

There is no doubt that approval of the Tribe's constitutional amendment would advance and protect the Tribe's best interests. At the present time, the only Crow land that is being commercially mined is located in the ceded strip. Economic conditions on the reservation are severely depressed. Unemployment among tribal members is extremely high/[sic] the Tribe is impoverished as are most of its members. These conditions have been aggravated by recent substantial cutbacks of federal funds and programs.

Immediate imposition of the Tribe's severance tax on Westmoreland's coal operation will go a long way toward alleviating these conditions.* It is the single most pressing item on the Tribe's agenda. It will enable the Tribe to

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* The Tribe will take steps to insure that Westmoreland is not subject to the severance taxes of both Montana and the Tribe. Westmoreland obviously would not be able to compete with other coal operators if it were subjected to a double tax and

restore some vitally needed services and to plan and undertake economic development projects aimed at utilizing the Tribe's energy wealth which would in turn generate greater tribal revenues and provide enhanced employment opportunities for tribal members.

This Memorandum demonstrates that there is ample legal authority to support the Tribe's power to impose its severance tax on its ceded strip coal. There are certainly no statutory or other prohibitions on the Tribe's authority to impose that tax. The Tribe has a desperate need for the additional revenues that would be generated by its tax. Under these circumstances, the government's trust obligation to the Tribe mandates that the constitutional amendment be approved so that the Tribe can impose and implement its tax.

Westmoreland is free to protest the tax and challenge its legality in the courts.* Westmoreland does not require any additional protection. The Tribe's severance tax is

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it is in the Tirbe's interest to insure that Westmoreland continues and, if possible, expands its present production.

* Westmoreland has intervened in *Crow Tribe v. Montana*, *supra*, and has contested the validity of the Tribe's severance tax. Consequently, the remand of that case from the Ninth Circuit will provide a forum for the resolution of that issue if Westmoreland elects to pursue its claim. Indeed, if the amendment to the Tribe's Constitution is not approved by the Secretary, the Tribe's tax cannot become effective and there would not be any actual case or controversy between the Tribe and Westmoreland. Thus, secretarial aproval of the Tribe's constitutional amendment is a condition precedent to a judicial determination. The courts should be the ultimate decision-makers on this issue, not the Secretary.

only 25% of the value of its coal as compared to Montana's 30% rate. Moreover, under the Ninth Circuit's decision in *Crow Tribe v. Montana, supra,* 650 F.2d 1104, it is highly probable that Montana's severance tax will be held invalid as applied to all of the Tribe's coal resources. If the amendment to the Tribe's Constitution is not approved, the result will be to foreclose any severance tax on ceded strip coal. Such a void would result in a windfall for Westmoreland and its customers that cannot be justified.

The Secretary's duty is to fulfill his trust obligation and to assist the Tribe's effort to become economically self-sustaining. Approving the amendment to the Tribe's Constitution would fulfill that obligation.

FREDERICKS & PELCYGER

BY _____
Robert S. Pelcyger

AMENDMENT TO AMENDED COAL MINING LEASE
OF
INDIAN LANDS

THIS IS AN AMENDMENT to the amended coal mining lease of Indian lands entered into between the Crow Tribe of Indians of the Crow Reservation ("Lessor") and Westmoreland Resources, Inc. ("Lessee").

THE BACKGROUND of this Amendment is as follows:

A. On November 26, 1974, Lessor and Westmoreland Resources, a partnership, entered into an amended coal mining lease of Indian lands known as Tract III.

B. The amended lease made no provision relating to any taxes which the Lessor might impose upon the operations of Westmoreland Resources.

C. Westmoreland Resources was incorporated on June 29, 1978 and on that date Westmoreland Resources, Inc. ("Lessee") became entitled to all of the rights and obligations of Westmoreland Resources, a partnership, in the amended lease and the partnership and its partners were thereby released from all obligations and liabilities thereunder.

D. Lessor, Lessee, and the State of Montana have been involved in a dispute as to the extent to which the Lessor and the State of Montana have the power to tax Lessee's mining operations pursuant to the amended lease, and the Lessor and Lessee desire to resolve the dispute between them by this Amendment to the amended lease.

THE TERMS of this Amendment are as follows:

1. On coal mined and shipped from the leased premises pursuant to the amended lease, Lessee will from time to time pay to the Lessor a tax equal to the Montana state coal severance tax existing at that time and applicable to the mining of coal generally within the state (currently 30 percent of sales price excluding taxes based on production) and a tax equal to the Montana state gross proceeds tax existing at that time and applicable to the mining of coal generally within the state (currently the county mill levy applied to 45 percent of gross receipts from mining, excluding taxes based on production), less whatever amount is required to be paid in severance and gross proceeds taxes to the State of Montana or its political subdivisions. Compliance with the terms of this Amendment shall satisfy any obligation which Lessee may have now or at any time hereafter to pay any severance or other tax to Lessor pursuant to any tax ordinance which now exists or may be adopted by Lessor hereafter and Lessor shall not attempt to assess or collect any tax or other amount from Lessee except as provided for in the lease as amended.

Notwithstanding the provisions of this paragraph 1, the amount payable hereunder shall not exceed the amount that Lessee would be obliged to pay the Lessor under tax ordinances of general application to all persons situated as Lessee, enacted by Lessor and then in effect, in the absence of this Amendment.

2. Lessee shall provide to the Lessor all of the information that Lessee may be, or otherwise would be, required to provide to the State of Montana or its political

subdivisions in satisfaction of the requirements of Montana's severance tax law and gross proceeds tax law at the same time that such information is, or otherwise would be, provided to the State of Montana or to its political subdivisions. Lessee shall pay any amounts due to the Lessor under this Amendment, and provide an accounting of, and explanation for, said amounts, at the same time that Montana's severance and gross proceeds taxes are being, or otherwise would be, paid.

3. In the event that either the Montana state severance tax or gross proceeds tax should be repealed or reduced below its current level, then

(a) Lessor may require Lessee to negotiate with Lessor on the amount of severance and/or gross proceeds taxes, if any, which Lessee will pay to the Lessor by giving Lessee notice of an intent to renegotiate this provision with respect to a severance tax and/or gross proceeds tax within ninety (90) days (unless otherwise agreed) after the effective date of the act of the Montana legislature or after action of any Montana political subdivision effecting any such reduction.

(b) Unless otherwise agreed, negotiations shall commence within thirty (30) days after Lessee's receipt of the Lessor's notice of intent to renegotiate.

(c) Lessee's obligation to pay a severance and/or a gross proceeds tax to Lessor under this Amendment shall be suspended during the period of renegotiation from the last day of the month in which the intent to renegotiate is received by Lessor. If tax rates are established by agreement as a result of renegotiation, then Lessee shall pay Lessor a tax or taxes based on those rates

retroactive to the time of suspension of payment under this Amendment.

4. In the event the parties are unable to reach an agreement on the amount of taxes to be paid to the Lessor within sixty (60) days of the commencement of negotiations (excluding time required to seek approval of any such agreement at the next meeting of Lessor's Tribal Council), then, unless otherwise agreed

(a) Lessor and Lessee agree to seek a judicial resolution by declaratory judgment in the United States District Court for the District of Montana of whether the Lessor has the power to impose taxes on Lessee in the absence of Lessee's agreement, as if this Amendment to the lease never existed;

(b) Lessor hereby waives whatever defense of sovereign immunity it may have for purposes of securing such a judicial resolution.

5. This Amendment to the lease will not be construed in any way as an admission by Lessor that Lessor has no power to tax Lessee without Lessee's consent.

6. This Amendment to the lease will not be construed in any way as an admission by Lessee that Lessor has any power to impose any tax on Lessee without Lessee's consent.

7. The amount of tax payable to Lessor under paragraph 1 of this Amendment will not exceed the amount that otherwise would be payable to Montana or its political subdivisions, giving effect to all allowable deductions and credits.

8. This Amendment shall become effective on approval by the Assistant Secretary for Indian Affairs following the approval of this Amendment by the Crow Tribal Council as evidenced by the attached certificate.

Executed on this 10th day of June, 1982.

Attest:
/s/ Theodore Hogan
Secretary, Crow Tribal Council

Attest:

/s/ Richard G. Dauger
Secretary

Approved:

/s/ Wilfred G. Bowther
By the Assistant Secretary for Indian Affairs, United States Department of the Interior

CROW TRIBE OF THE CROW INDIAN RESERVATION

By: /s/ Donald R. Stewart
Donald Stewart, Chairman of the Crow Tribe of Indians

WESTMORELAND RESOURCES, INC.

By: /s/ C. Joseph Presley
C. Joseph Presley, President

Date: Sept. 29, 1982

State of Montana)
) ss.
County of Big Horn)

On this 10th day of June, 1982, before me, the undersigned, a Notary Public for the State of Montana, personally appeared Donald Stewart, known to me to be the Chairman of the Crow Tribe of Indians that executed the within instructment and acknowledged to me that such Tribe executed the same.

WITNESS my hand and seal the day and year first hereinabove written.

My commission expires: NOTARY PUBLIC for the State of Montana Residing at Billings, Montana My Commission Expires Sept. 9, 1984

Illegible
Notary Public
Address: Billings, Montana

State of Montana)
) ss.
County of Yellowstone)

On this illegible day of June, 1982, before me, the undersigned, a Notary Public for the State of Montana, personally appeared C. Joseph Presley, known to me to be the President of the corporation that executed the within instrument and acknowledged to me that such corporation executed the same.

WITNESS my hand and seal the day and year first hereinabove written.

My commission expires: July 9, 1982

/s/ Illegible
Notary Public
Address: Box 1883
Billings, MT 59103

Certificate

This Amendment was presented to the Crow Tribal Council at a duly called Council meeting held on July 10, 1992, and the Crow Tribal Council approved the Amendment by the attached resolution.

/s/ Donald R. Stewart
Donald Stewart,
Chairman of the
Crow Tribe of Indians

Dated: July 13, 1982 /s/ Ted Hogan
Ted Hogan,
Secretary of the
Crow Tribe of Indians

Robert S. Pelcyger
Thomas W. Fredericks
Thomas R. Acevedo
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Attorneys for Plaintiff
Crow Tribe of Indians

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, v. STATE OF MONTANA; ELLEN FEAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana; CARIBEL BONINE, Treasurer, Treasure County, Montana. Defendants, WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	No. CV-78-110-BLG THIRD AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, RESTITUTION, TAX REFUNDS, MONEY DAMAGES, AND OTHER RELIEF.

Plaintiff, CROW TRIBE OF INDIANS, by their attorneys, bring this action against the above-named defendants and allege as follows:

JURISDICTION

1. This is a civil action for injunctive, declaratory, restitutionary, tax refunds, money damages, and other relief.

It arises under Article I, Section 8, Clause 3 of the Constitution of the United States; under the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1976); under the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; under Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 675; and under 42 U.S.C § 1983. This Court has jurisdiction under 28 U.S.C. §§ 1362 and 1343.

PARTIES

2. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by 14 the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

3. Defendant STATE OF MONTANA (hereinafter "State" or "Montana") is a sovereign State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

4. Defendant ELLEN FEAVER is Director of the Montana Department of Revenue. She is sued in her official

capacity; her official address is: Department of Revenue, Sam W. Mitchell Building, Rm. 455, Helena, Montana 59601.

5. Defendant BIG HORN COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Big Horn County.

6. Defendant YELLOWSTONE COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Yellowstone County.

7. Defendant TREASURE COUNTY, Montana, is a political subdivision of the State. Part of the Crow Tribe's reserved coal resources are encompassed within the exterior boundaries of Treasure County.

8. Defendant LORRAINE HAMILTON is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Box 8, Hardin, Montana 59034.

9. Defendant MAY JENKINS is Treasurer of Yellowstone County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Billings, Montana 59101.

10. Defendant CLARIBEL BONINE is Treasurer of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Box 429, Hysham, Montana, 59038.

11. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying the Crow Reservation and an area known as the "ceded area" that was opened to allotment and settlement by non-Indians pursuant to the Act of April 17, 1904, 33 Stat. 352. In all, the plaintiff Tribe is the beneficial owner of approximately six billion tons of coal within the State. Smaller amounts of coal underlying the Crow Reservation are owned by persons or entities other than the Tribe. The United States manages and supervises the Tribe's trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

12. Since 1967, pursuant to the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968 82 Stat. 123, the United States Secretary of the Interior and the Commissioner of the BIA (now the Assistant Secretary of the Interior for Indian Affairs) have actively recommended, encouraged, advised, and approved transactions involving the development of Crow coal resources.

13. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale of prospecting permits covering Crow coal underlying 34,671 acres in the ceded area. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. One of the leases, which

encompassed approximately 16,130 acres, was subsequently terminated by mutual consent of the Tribe and Westmoreland with the approval of the Department of the Interior. Westmoreland is the only lessee currently mining Crow coal. The existing lease was amended by agreement dated July 10, 1982 which was approved by the BIA on September 29, 1982.

14. On May 8, 1980, the Tribe entered into a lease with the Shell Oil Company embracing Crow coal underlying approximately 2,560 acres within the Crow Indian Reservation. This agreement also includes various options for mining Crow coal underlying additional acreage within the Crow Reservation. The agreement and lease will become effective when approved by the Secretary of the Interior or his authorized representative.

15. The Tribe is currently negotiating with several other companies who have expressed considerable interest in entering into leases, joint ventures, or other mining agreements with the Crow Tribe for the development and production of Crow coal.

16. In 1975, the State enacted statutes which imposed on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Montana Code Annotated §§ 15-35-101 through 15-35-111, 15-23-701 through 15-23-704.

17. Defendants Feaver, Hamilton, Jenkins, and Bonine are the state and county officials charged by Montana law with the enforcement and collection of the Montana coal severance and gross proceeds taxes.

18. Most of the Crow coal is, or will be, mined from the surface and is, or will be, taxed at the rate of 30% of the contract sales price pursuant to the State's severance tax statute. Since 1978 and 1976, Westmoreland has paid more than $54,000,000 in state severance taxes and approximately $7,000,000 in gross proceeds taxes on the production and sale of the coal under lease from the Crow Tribe. During this same period, Westmoreland has paid the Crow Tribe approximately $15,000,000 in royalties pursuant to its lease.

19. There are approximately 6,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. To date, the Crow people have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status. The development of tribal coal offers an unprecedented opportunity for the Crow people to improve their economic situation.

20. The Crow Tribe and its members are severely impoverished. The Tribe is deeply in debt; it does not have sufficient revenues to provide adequate services; and the unemployment rate among tribal members is extremely high, much higher than among the non-Indian populations of Montana and adjacent states.

21. The Crow Tribe's existing coal mining leases with Westmoreland and Shell include provisions which

require the lessees to pay the Tribe amounts equal to Montana's taxes less whatever the lessees are required to pay to the State.

22. The imposition, assessment and collection of the 30% state severance tax and the gross proceeds tax have imposed a direct and severe burden upon the plaintiff Tribe in that the taxes are a direct and major cost associated with the production of Crow coal.

23. The natural and immediate consequences of the imposition, assessment, and collection of these taxes have been: (i) drastically increased costs to purchasers of Crow coal; (ii) a correspondingly severe restriction upon the amount of royalty payments which Westmoreland and others have been willing to pay to the plaintiff Tribe under their leases; and (iii) the frustration of efforts by the Tribe to renegotiate its leases with Westmoreland and others. The state severance and gross proceeds taxes have adversely affected the competitive status of Crow coal and, when taken in conjunction with the Crow tribal tax, may increase the cost of Crow coal so drastically as to render that coal noncompetitive in the marketplace and thereby threaten to preclude further Crow coal development.

24. The existence of the 30% state severance tax and the gross proceeds tax has frustrated efforts by the Tribe to negotiate or renegotiate leases with the other permittees and lessees of Crow coal and has severely depressed the amount of royalties which those permittees and lessees are willing and able to pay to the Tribe under any such leases or pursuant to other arrangements.

25. The existence of the 30% state severance tax and the gross proceeds tax and the gross proceeds tax [sic] has also frustrated efforts by the Tribe to offer permits and leases covering additional coal deposits in the ceded area and elsewhere on the reservation. It has also rendered the Tribe incapable of entering into any fair arrangements for the development of tribal coal or of developing its own coal pursuant to mining contracts with persons capable of performing the actual mining of such coal.

26. Prior to and since the enactment of the challenged and tax laws, Crow tribal representatives, by correspondence by testimony before the Montana legislature, have consistently protested the imposition of these unlawful taxes upon Crow coal, to no avail.

27. Plaintiffs are without recourse to any remedies other than those sought by this Complaint and, unless such relief is granted, they will continue to suffer immediate and irreparable injury.

28. An actual controversy has arisen and now exists between the plaintiff and the defendants as to the validity of the State's severance and gross proceeds taxes as applied to Crow owned coal and to coal underlying the Crow Indian Reservation.

FIRST CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 28.

29. The Constitution of the United States, Article I, Section 8, Clause 3, grants to the Congress of the United

States exclusive authority over commerce with Indian tribes. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal under lying the Crow Indian Reservation have not been authorized by Congress. These Montana taxes therefore constitute an unlawful and unconstitutional interference with Congress' exclusive authority over Indian commerce.

SECOND CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 29.

30. Montana's severance and gross proceeds taxes on all of the sale and production of Crow owned coal and on coal underlying the Crow Indian Reservation are inconsistent with, and under the Supremacy Clause of the United States Constitution, are preempted by, the Indian Mineral Leasing Act of 1938, and its implementing regulations, 25 C.F.R. §§ 171.1-171.30, 173.1-173.29 insofar as those taxes: (i) deprive the Crow Tribe of its authority and control over its mineral resources; (ii) severely discourage the economic development of the Crow Reservation; (iii) deprive the Crow Tribe of a very large portion of the economic benefits of its coal; (iv) diminish substantially the power of the Crow Tribe to regulate the development of its mineral resources; or (v) appropriate to the State a significant portion of the value of the Tribe's coal resources that has no relationship to the services, if any, related to the development of that resource provided by the State and its political subdivisions.

THIRD CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 30.

31. Montana's 30% severance tax is invalid on its face as applied to all Crow owned coal and to all the coal underlying the Crow Indian Reservation because: (i) the purpose of the tax is to appropriate most of the economic rent attributable to the production of such coal; (ii) the magnitude of the tax is enormous in and of itself and is significantly greater than comparable taxes imposed by other states; and (iii) 50% of the proceeds of the tax are paid into a trust fund which can be used for any governmental purpose, is not tied in any way to State costs or services attributable to the mining and production of such coal, and has the effect of appropriating the Crow Tribe's mineral wealth for the benefit of the State.

FOURTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 31.

32. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal underlying the Crow Indian Reservation have:

(i) illegally subjected the property of the sovereign Crow Tribe and the property subject to the Tribe's jurisdiction to an unauthorized state tax;

(ii) illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of their land, thereby depriving them of

liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and of the federally protected and guaranteed rights of the Tribe and its members;

(iii) illegally threatened and interfered with the ability of the sovereign Crow Tribe to exercise its sovereignty through tribal taxes;

(iv) illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people;

(v) illegally and severely impaired the ability of the Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program, and its reservation maintenance services; and

(vi) illegally and severely impaired the ability of the sovereign Crow Tribe to engage in various economic development activities aimed at producing vitally needed jobs for tribal members and reservation residents and income for the Tribe and its members.

33. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal underlying the Crow Indian Reservation infringe on and interfere with the rights of the Crow Indians to make their own laws and be ruled by them.

FIFTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 33.

34. On January 31, 1976, the plaintiff Tribe enacted its own tribal coal taxation code, which imposes upon persons mining Crow coal a severance tax of 25% of the value of Crow coal mined by such persons. On January 17, 1977, the Secretary of the Interior approved the Crow taxation code to the extent that it applied to coal underlying the Crow Reservation proper, but disapproved the tax to the extent that it applied to the Crow Tribe's coal in the ceded strip. The Crow Tribe has also enacted a gross proceeds tax on the sale of Crow coal.

35. On July 10, 1982, the Crow Tribe and Westmoreland agreed to an amendment to their coal mining lease under which Westmoreland recognized the right of the Crow Tribe to levy and collect severance and gross proceeds taxes on the production and sale of Crow owned coal in the ceded strip. That amendment was approved by the Bureau of Indian Affairs on September 29, 1982.

36. The Crow tribal severance and gross proceeds taxes, enacted and agreed to in exercise of the Tribe's sovereignty and approved by the Secretary of the Interior pursuant to congressionally delegated authority in the implementation of federal policy, preempts state taxation of the subject coal.

SIXTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 36.

37. Montana's severance and gross proceeds taxes on the sale and production of Crow coal and on all of the coal underlying the Crow Indian Reservation is unconstitutional because it constitutes a multiple and impermissible burden on interstate commerce in violation of the Interstate Commerce Clause of the Constitution, Article I, Section 8, Clause 3.

SEVENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 37.

38. Defendants are required to give all producers and sellers of Crow coal and of all coal underlying the Crow Indian Reservation a credit against Montana's severance and gross proceeds taxes for the full amount of any and all severance and gross proceeds taxes paid by such producers and sellers to the Crow Tribe.

EIGHTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 38.

39. The State's severance and gross proceeds taxes constitute unlawful taxes on the property of the Crow Tribe held in trust by the United States insofar as the State's taxes are based in part on the value of the Crow Tribe's royalty interest.

NINTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 39.

40. All of the severance and gross proceeds taxes collected by the State of Montana from Westmoreland based on the sale and production of coal mined pursuant to the lease between Westmoreland and the Crow Tribe have been illegal and unconstitutional.

41. Montana's severance and gross proceeds taxes as applied to Crow owned coal and to coal underlying the Crow Indian Reservation are now illegal and have been illegal since collections began in 1975 and 1976 respectively. The effect of these taxes has been to deprive the Crow Tribe of its rights under federal law, to diminish substantially the value of the Crow Tribe's coal resources, and to impinge and interfere with the Tribe's sovereign right to govern its reservation.

42. The Crow Tribe is entitled to a refund of all severance and gross proceeds taxes that have been paid to the defendants on the production and sale of Crow owned coal and of coal underlying the Crow Indian Reservation.

TENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 42.

43. Defendants have been unjustly enriched and have wrongly profitted [sic] from the collection of severance and gross proceeds taxes on the production and sale of Crow owned coal and coal underlying the Crow Indian

Reservation. The plaintiff Crow Tribe of Indians is entitled to restitution of those illegally collected funds in order to restore to the plaintiff and to take away from the defendants the benefits and monies that rightly belong to the plaintiff.

ELEVENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 43.

44. The existence of Montana's severance and gross proceeds taxes on Crow owned coal and on the coal underlying the Crow Indian Reservation has stifled and caused severe reductions in the amount of such coal that otherwise would have been mined, produced and sold. The plaintiff Crow Tribe has been and continues to be severely damaged by such reductions.

TWELFTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 44.

45. It is unfair, unconscionable and inequitable for the defendants to hold, benefit from and utilize the revenues collected from severance and gross proceeds taxes that have been imposed on the production and sale of Crow owned coal and on coal underlying the Crow Indian Reservation. It is necessary to impose a constructive trust on such funds for the benefit of the plaintiff Crow Tribe of Indians in order to prevent unjust enrichment to the defendants.

THIRTEENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 45.

46. Plaintiff is and has been the beneficial owner of the sums of money that have been paid to the defendants in the form of severance and gross proceeds taxes on the production and sale of Crow owned coal and of coal underlying the Crow Indian Reservation. The defendants have wrongfully converted these sums of money. The defendants are liable to the plaintiff for the value of such wrongfully converted property.

FOURTEENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 46.

47. By reason of the allegations set forth in this complaint, plaintiff is entitled to additional sums as punitive or exemplary damages from the State.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

1. A judgment declaring that the Montana Coal Severance Tax, M.C.A. §§ 15-35-101 to 15-35-111, and the Montana Gross Proceeds Tax, M.C.A. §§ 15-23-701 to 15-23-704 are invalid and have been preempted by federal law as applied to all coal that is held by the United States in trust for the Crow Tribe of Indians and to all coal underlying the Crow Indian Reservation;

2. A judgment enjoining the defendants from imposing, collecting, and enforcing the Montana Coal Severance Tax and the Montana Gross Proceeds Tax on all coal that is held by the United States in trust for the Crow Tribe of Indians and to all coal underlying the Crow Indian Reservation;

3. A judgment ordering the defendants to give all producers and sellers of Crow coal and of all coal underlying the Crow Indian Reservation a credit against Montana's severance and gross proceeds taxes for the full amount of any and all severance and gross proceeds taxes paid to the Crow Tribe of Indians.

3. [sic] A judgment awarding the Crow Tribe of Indians all severance and gross proceeds taxes that have been paid to the defendants based on the production or sale of all coal held by the United States in trust for the Crow Tribe of Indians and all coal underlying the Crow Indian Reservation;

5. A judgment declaring that all tax revenues that have been collected by the defendants based on the production and sale of Crow coal and all coal underlying the Crow Indian Reservation are held by the defendants in constructive trust for the sole use and benefit of the Crow Tribe of Indians and ordering the defendants to utilize, invest, dispose of, and expend all such funds for the sole use and benefit of the Crow Tribe of Indians.

6. A judgment awarding the Crow Tribe of Indians punitive or exemplary damages in an amount to be determine by the Court.

7. A judgment awarding the Crow Tribe of Indians cost of suit, expert witness fees, and attorneys' fees.

8. For such additional relief as the Court may deem just and proper.

DATED: November 19, 1982.

Respectfully submitted,

Robert S. Pelcyger
Tom W. Echohawk
FREDERICKS & PELCYGER
Francis X. Lamebull
LAMEBULL LAW FIRM

By: /s/ Robert S. Pelcyger
Robert S. Pelcyger

Attorneys for Plaintiff
Crow Tribe of Indians

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, Donald W. Stewart, Sr., being first duly sworn, deposes and says:

1. I am the Chairman of the Crow Tribe of Indians.

2. I have read the Third Amended Complaint of the Crow Tribe of Indians in the case of Crow Tribe v. Montana, Civil No. 78-110-BLG, in the United States District Court for the District of Montana, Billings Division. The

statements made in the Third Amended Complaint are true and are based on my own knowledge, information, and belief.

/s/ Donald A. Stewart, Sr.
Donald A. Stewart, Sr.

SUBSCRIBED AND SWORN TO before me this 16th day of November, 1982, by Donald A. Stewart, Sr.

/s/ Diane Illegible
Notary Public

My Commission Expires
March 11, 1986
1007 Pearl St. #240
Boulder, Colorado 80302

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NO. CV-78-110-BLG

THE CROW TRIBE OF INDIANS, et al., Plaintiffs, vs. THE STATE OF MONTANA, et al., Defendants.	MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO DEPOSIT FUNDS, and MOTION FOR PRELIMINARY INJUNCTION

STATEMENT OF FACTS

I.

To put in perspective the Crow Tribe's motion for preliminary injunction, and the Tribe and Westmoreland's motion to deposit funds into Court, it would be helpful to first briefly review some facts in this case.

In 1972 Westmoreland Resources, Inc. (hereinafter Westmoreland) entered into an agreement for coal mining

leases with the Crow Tribe of Indians (hereinafter the "Tribe"), covering about 31,000 acres of the so called "Ceded Strip", an area North of the Present Crow Indian Reservation. That 1972 agreement between the Tribe and Westmoreland did not include any provision for a Tribal severance tax on Westmoreland.

In 1975 the State of Montana (hereafter "State") enacted its present Coal Severance Tax, which tax is imposed on coal mine operators, including Westmoreland, who produced coal in Montana, and which tax was upheld by the United States Supreme Court. *Commonwealth Edison v. Montana*, 453 U.S. 609, 101 S. Ct 2946, 69 L Ed 2d, 884 (1981).

In January 1976 the Tribe enacted its own coal severance tax; however, at present there is no evidence in the record here that the Tribe's severance tax with regard to the "Ceded Strip" has been approved by the U.S. Secretary of the Interior.

In July 1978 the Tribe sought injunctive and declaratory relief challenging the Montana Severance Tax. Westmoreland moved to intervene and filed a counterclaim against the Tribe challenging the Tribe's right to tax Westmoreland and a crossclaim against the State, which claims are still pending.

In April 1979 this Court dismissed the Tribe's complaint pursuant to F.R. Civ. P. 12(b)6 for failure to state a claim. *Crow Tribe v. State of Montana*, 469 F. Supp 154.

In July 1981 the 9th Circuit Court of Appeals reversed and remanded for proceedings consistent with the Court's opinion, finding that the allegations of the

Tribe which sought declaratory and injunctive relief stated a cause of action. *Crow Tribe v. State of Montana*, 650 F.2d 1104, Cert denied ___ U.S. ___, 102 S. Ct. 2926 73 L Ed2d 1327, (1982).

On October 13, 1982, the Tribe and Westmoreland filed a Motion for leave to deposit Westmoreland's Montana Severance Taxes with the Court. On October 21, 1982, this Court issued an Order denying the motion for leave to deposit funds, finding, based on arguments of counsel, that the Tribe and Westmoreland had made no showing of certain harm if funds were not deposited but noted that the motion could be renewed.

On November 17, 1982 this Court issued an Order stating that the Tribe has 45 days from such Order to file and serve its third amended complaint, and that the Defendants shall have 30 days after service of said third amended complaint to file an answer.

On November 19, 1982, the Tribe filed a Motion for leave to file an amended complaint and filed and served a third amended complaint. The Defendants intend to answer the third Amended Complaint on or before December 20, 1982, and will deny many of the allegations therein.

On November 19, 1982 the Tribe and Westmoreland filed a motion pursuant to F.R. Civ. P. 67 to deposit funds with the Court; concurrently the Tribe filed a motion for preliminary injunction pursuant to F.R. Civ. P. 65 to enjoin the State from taking any action to enforce or collect its severance taxes from Westmoreland or penalizing Westmoreland for nonpayment of the tax to the extent the tax is imposed on coal held in trust for the Tribe. The record

does not contain any evidence as to actual ownership of the coal or what portion, if any, of the coal lands leased by Westmoreland fall within the category of that held in trust by the United States for the benefit of the Tribe.

There is little, if any factual evidence in the record of this case to support the Tribe's allegations in its original or amended complaints, or present motions before the Court filed on November 19, 1982, because there has been no discovery completed and no evidentiary hearings.

II.

ARGUMENT

A. INTRODUCTION:

It is important, for the purposes of the Court's ruling on the Tribe's request for a preliminary injunction and for deposit of the funds, that the Court distinguish between facts actually of record and those which are described by counsel for the Tribe but which are not actually of record before this Court.

Thus in proceeding to rule on the Pending Motion for the requested Preliminary Injunction the Court must weigh the actual showing made by the Tribe, that is in the way of actual facts of record, against the requirements that must be met by any applicant for preliminary injunctive relief. An applicant for such relief, in this case the Tribe, has the burden of showing that it meets certain tests, described later in Part E of this Memorandum, particularly pages 27 through 33. The Rule 67 Motion requests deposit of the funds in an account which effectively prevents the State from having the use and benefit

of the funds for the public purposes enumerated by §15-35-108 M.C.A. If that Motion is granted by this Court the ultimate effect upon the State, the public and even the Tribe is that the funds are not available for their intended public purposes, because the funds cannot be spent for such public purposes if they are deposited in escrow and thus a Rule 67 deposit has the same effect as an injunction.

The effect of the relief requested by the Tribe's motion for preliminary injunction and Westmoreland and the Tribe's motion to deposit funds, is to interfere with the normal operation, collection, enforcement, and disbursement of the Montana coal severance tax.

There are several reasons why this Court should deny the Tribe's motion for preliminary injunction, and the Tribe's and Westmoreland's motion to deposit funds. The Court could simply deny such relief upon the basis that the Tribe and Westmoreland have not met their burden of showing that they are entitled to a preliminary injunction or similar relief, but there are other threshold basis for denying relief. For purposes of organization and discussion this Memorandum presents the reasons and basis for denying the requested relief in the following order:

1. That 28 U.S.C. §1341, which generally prohibits Federal Courts from enjoining, suspending or restraining State's collection and disbursements of taxes, bars this Court from granting Westmoreland or the Tribe any relief which would enjoin, suspend, or

restrain Westmoreland's payment of Montana's Severance Tax or disposement thereof; and

2. That the Tribe does not have standing to seek a preliminary injunction in this case; and

3. That F.R. Civ. P. Rule 67, which provides for deposit of an undisputed sum of money, is not an appropriate remedy in this case; and

4. Finally, that the Tribe and Westmoreland have simply not met their evidentiary burden of proof considering the evidence in the record in this case, and have not met the normal criteria for a preliminary injunction, or similar relief.

These basis and reasons for denying the relief sought by the Tribe and Westmoreland are discussed more fully below, and can be viewed as a series of increasingly difficult hurdles which the moving parties must but can not overcome, in order to be entitled to the relief they seek.

B. THE TAX INJUNCTION ACT:

1. General prohibition against interference with State taxes.

The Tax Injunction Act, 28 U.S.C. §1341 provides:

> "District courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plan, speedy, and efficient remedy may be had in the Courts of such State."

The plain statutory language of the Tax Injunction Act prohibits Federal District Courts in nearly all circumstances from interfering with the collection and disbursement of State taxes. Congress created the bar to federal court jurisdiction to enjoin State taxes in 1937. Since that time, the Courts have consistently recognized and upheld the bar as an expression of strong public policy of federal non-interference with State taxation schemes, *Mandel v. Hutchinson*, 336 F.Supp. 772 (1971), aff'd., 494 F.2d 364, 366 (9th Cir. 1974), and as a "broad jurisdictional impediment to federal court interference." *Dillon v. Montana*, 634 F.2d 463, 466 (9th Cir. 1980). This jurisdictional impediment cannot be avoided by basing a taxpayer's complaint upon alleged violations of 42 U.S.C. §1983, 28 U.S.C. §1343, or the Federal Constitution. *See, e.g., Lynch v. Household Finance*, 405 U.S. 538, 542-3, n 6 (1972); *Kelly v. Springett*, 527 F.2d 1090, 1094 (9th Cir. 1975); *Mandel v. Hutchinson, supra*, 494 F.2d page 366; *Hickman v. Wujick*, 488 F.2d 875 (2d Cir. 1973); *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied*, 410 U.S. 966 (1973); *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966).

2. A deposit of funds has the same effect as an injunction.

As a practical matter, the relief sought by the Tribe and Westmoreland, pursuant to Rule 67 to deposit funds, has the same effect as an injunction and falls within the §1341 prohibition not to " . . . enjoin, suspend or restrain", the assessment or collection of a state's taxes. For example, courts have pointed out that where a declaratory judgment would operate to suspend the collection

of a tax and afford about the same relief as granting an injunction, then declaratory as well as injunctive relief is precluded by §1341, particularly where the party has other adequate remedies. *Department of Employment v. United States*, 385 U.S. 355, 17 L Ed, 1054 (1966). As Justice O'Conner stated in a recent case:

> "Initialled [sic], we observe that the Act (i.e. 28 U.S.C. 1341) not only divests the district court of jurisdiction to issue an injunction enjoining state officials, but also of jurisdiction to take actions that "suspend or restrain" the assessment and collection of state taxes. Because the declaratory judgment "procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *Great Lakes Dredge & Dock v. Huffman*, 319 U.S. 293, 87 L Ed 1407, 63 S.Ct. 1070 (1943), the very language of the Act suggests that a federal court is prohibited from issuing declaratory relief in state tax cases. Additionally, because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of *anticipatory* relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of Taxes,". *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522, 67 L Ed 2d 464, 101 S Ct., 221 (1981).

California v. Grace Brethern Church, 102 U.S. 2508, 73 L Ed 2d 93, 102 S Ct. ___.

3. Westmoreland is barred relief by §1341.

Clearly Westmoreland is barred, under 28 U.S.C. §1341, from seeking injunctive relief, or relief which would "suspend or restrain", the collection of taxes, including as noted above, a deposit of taxes in escrow under Rule 67. Westmoreland, the taxpayer, and as such the real party in interest for purposes of injunctive relief, has a plain, speedy and efficient remedy available in the Montana State Courts. Montana statutes permit Westmoreland to pay the taxes under protest and sue in State Court to recover them, Section 15-1-402, M.C.A., or to seek declaratory judgment that the taxes are invalid, Section 15-1-406, M.C.A.

The coal severance tax being challenged here is the same tax recently challenged but upheld by the United States Supreme Court in *Commonwealth Edison v. Montana*, 453 U.S. 609, 101 S. Ct 2946, 69 L.Ed 2d 884 (1981). Westmoreland was among the utilities making the unsuccessful challenge. During the pendency of that case, Westmoreland did pay the severance tax under protest and sue in the Montana state courts to recover the tax. Since the decision of the U. S. Supreme Court in July, 1981, Westmoreland has not used its state remedies to challenge the Montana's Severance Tax here involved. Moreover, Westmoreland does not argue in this proceeding that those state remedies are somehow inadequate.

4. The Tribe does not qualify under the exception to §1341.

The Tribe, in its Memorandum, argues that 28 U.S.C. §1341 does not bar this Court's jurisdiction to grant the injunctive relief sought here by the Tribe because of a limited exception to §1341 for suits brought by Indian Tribes, relying on 28 U.S.C. §1362 and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634. Section 1362 provides:

> "The District Court shall have original jurisdiction of all civil actions, brought by an Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

The *Moe* case can be distinguished from the present case. In *Moe*, the state was applying its cigarette tax and personal property tax to Tribe members residing on the reservation. The Montana Severance Tax in this case is not imposed upon the Indians themselves, or upon mining activity on the reservation itself, nor upon any mining activity conducted by the Tribe.

In *Moe*, the United States Supreme Court held that the District Court had properly exercised jurisdiction over the claims of the Salashi and Kootenae Tribes' claims for relief in that case, as Section 1362 provided properly recognized Tribes with access to Federal Courts that "would be at least in some respects as broad as that of the United States suing as the Tribe's trustee." 425 U.S. at 473. The Court did not consider it necessary to decide whether the District Court had jurisdiction over plaintiffs

other than the Tribes in *Moe* and declined therefore, to make a decision on that question. 425 U.S. at 474-475, n 14. However, there is simply no authority permitting entities other than Indian Tribes to use §1362 in order to avoid the jurisdictional bar of §1341. Nor is there any authority permitting Indian Tribes to stake claims on behalf of intervenor defendants so that §1341 can be avoided.

(a) There is no factual evidence in the record to show that the Tribe has a monetary stake or litigious interest under Section 1362 in this case.

In its Memorandum in support of its motion for preliminary injunction, page 11, the Tribe alleges that it now has a direct monetary stake in this case, and an interest in protecting tribal government against state interference, which allows it to invoke federal jurisdiction. The tax here in question is paid by Westmoreland, not the Tribe. It is acknowledged that the Tribe and Westmoreland have entered into an amendment to their coal lease in 1982, but this can only create a fictional argument that the Tribe takes on the attributes of a taxpayer, or has a direct monetary stake in this litigation at this time. The Tribe bases its allegations of a monetary stake or litigious interest in seeking injunctive relief or a deposit primarily on the decision of the 9th Circuit in this case. However, as we shall develop more fully below, the decision of the 9th Circuit in this case, may have been

premised on erronous assumptions because there is question, and certainly lack of evidence in the record[1] before this Court, (1) as to whether the coal in the "Ceded Strip" and coal here in question, is the property of the Tribe, or held in trust for the Tribe, before it was leased, and (2) whether the Tribe's severance tax has been approved by the Secretary of the Interior, and would therefore be applicable to on and prior to January 31, 1983 to some but undocumented extent to the "Ceded Strip", and Westmoreland, even if the Montana Severance Tax did not exist. Therefore there is no evidence in the record that the Tribe is entitled to a refund of all, or a portion of the Montana Severance Tax paid to date or which will be paid on January 31, 1983. And the 9th Circuit noted that the Tribe is not entitled to a refund. *Crow Tribe v. State of Montana*, 650 F.2d 1104, n 13.

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[1] On page 2 of the Tribe's Memorandum in support of its motion for preliminary injunction it states – "the underlying minerals are held in trust for the Tribe and are subject to being leased pursuant to the 1938 Indian Mineral Leasing Act." The Tribe cites, *Cady v. Morton*, 527 P.2d 786, 789 (9th Cir. 1975); and this case, *Crow Tribe of Indians v. State of Montana*, 650 P.2d [sic] 1104, 1107 1114 n 16 (9th Cir. 1981) as basis for such ownership. However, in neither of these cases, was there any factual evidence or judicial determination of ownership of the coal but rather the Court's opinions were based on allegations and assumptions that the coal is held in trust for the Tribe. As we shall show, there is reason to believe at least a sizeable portion of the coal in the ceded strip does not belong and is not held in trust for the Tribe (see affidavit and paper, "Mineral Ownership on the Crow Ceded Strip January 1982", of Robert Snively).

(b) <u>The decision of the 9th Circuit is not conclusive evidence that the Montana Severance Tax violates any statute or the Tribe's rights or interests.</u>

Even if the assumptions of the 9th Circuit decision are correct that the Tribe owns the coal here involved, and even if the Tribe's tax is applicable, uncontested and certain as to amount, of the coal here involved, the Tribe misapprehends and quotes the decision of the 9th Circuit out of context. Basically, what the 9th Circuit's decision in this case did was hold that the allegations of the Tribe for injunctive and declaratory relief stated a cause of action, for declaratory relief, and contemplated the development of a record before this Court. The Court reversed and remanded for additional findings. For example, the 9th Circuit stated:

> "The Tribe has alleged facts that, *if proved*, would establish that the taxes are preempted . . . " (Emphasis added) (*Crow Tribe* p. 1107)

and for example the Court stated:

> "*If* the allegations of the complaint are sustained at trial, the Montana Coal Severance Tax will conflict . . . " (Emphasis added) (*Crow Tribe*, p. 1113)

Or as stated by the Court, the Tribe:

> "*To support its claim at trial*, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate tribal resources, and that the balance of state and tribal interests renders the state's

assertion of taxing authority unreasonable." (Emphasis added) (*Crow Tribe*, p. 1117)

Obviously, the record on many of the issues framed by the 9th Circuit, is yet to be developed in this case. And, while the Tribe quotes certain statements of the 9th Circuit which they argue support their allegations, there are also numerous quotes from the 9th Circuit decision, which support the position of the state, and the position that the Montana Severance Tax does not violate any Federal statutes or rights of the Tribe. For example, the Court stated:

> " . . . legitimate interest of the State must be considered, and the ultimate result . . . depends on "a particularized inquiry into the nature of the State, Federal, and Tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of State authority would violate Federal Law." *White Mountain Apache Tribe v. Bracher*, 448 U.S. at 149, 100 S. Ct. at 250. (*Crow Tribe v. Montana*, p. 1109).
>
> Some economic impact on Indian Tribes can be justified if state interests in imposing tax on coal from the Indian lands are legitimate. (*Crow Tribe v. Montana*, p. 1113).
>
> . . . the reviewing court must balance the importance of the state interest in asserting the particular authority against the impact of the Tribe's ability to govern itself effectively. *Fort Mojave Tribe v. County of San Bernardino*, 543 Fed. 1253, (9th Cir. 1976). (*Crow Tribe v. Montana*, p. 1115).

The 9th Circuit decision left many factual determinations unresolved. There is little if any other evidence in the record in this case by which the Tribe has established

that it has a direct or litigable interest under Section [sic] 28 U.S.C. §1362, which would be the basis for an exception to 28 U.S.C. §1341, particularly for anticipatory injunctive relief.

The exception allowing district court jurisdiction of cases brought by Indian Tribes involving state taxes is a narrow exception to §1341 bar of jurisdiction. *Dillon v. Montana*, 634 F.2d 466, 469 (Cir. Ct 1981); *Navaho Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228, 1233-34 (9th Cir. 1979). Therefore, the Tribe should be barred under §1341 from seeking injunctive relief in this case. Clearly, Westmoreland is barred by Section 1341, and the Tribe should not be allowed to stretch the Indian jurisdiction exception under Section 1362 for purposes of seeking injunctive relief until a record is developed in this case which demonstrates that the Tribe does in fact have an interest in the funds sought here to be enjoined or deposited.

C. STANDING:

Even if the Tribe can clear a first hurdle, and show that this Court has jurisdiction despite the prohibitions of 28 U.S.C. §1341, the Tribe can not clear a second hurdle, showing that it has standing at this time to seek injunctive relief or deposit of Westmoreland's Montana Severance Tax.

1. Standing generally.

In essence the question of standing is whether the litigant is entitled to have the Court decide the merits of a

particular issue, in this case the Tribe's requests for a preliminary injunction and deposit of funds. Standing is founded on concern about the proper, and properly limited role of the courts. Standing to sue is a constitutional limitation on federal court jurisdiction, but there are also prudential limitations of the exercise of federal jurisdiction concerning whether the interests sought to be protected are within the zone of interest to be protected. In order to have standing a plaintiff must always have suffered a distinct and culpable injury to himself that is likely to be redressed if the requested relief given is granted. In other words, the plaintiff must show actual or threatened injury of some kind to establish standing. Fed. Proc., L Ed Section 59:4. Standing to litigate exists where there is actual injury, redressable by the Court which can be traced to challenged action. *Valley Forge Christian College v. Americans United For Separation Of Church and State, Inc.*, ___ U.S. ___, 102 S.Ct. 758. Only if these requirements are met does the Federal Court have jurisdiction under Article III "Case or Controversy" requirement of the U.S. Constitution. Ordinarily, a party has no standing to assert the rights of third persons. The plaintiff must allege that he is the proper party to invoke the court's jurisdiction. The needed facts for the plaintiff's standing must adequately appear from the record or the motion must be dismissed. *Warth v. Seldin*, (1975) 422 U.S. 490, 45 L.Ed2d 343, 95 S.Ct. 2197.

2. <u>The Tribe has no proven direct injury for purpose of standing.</u>

The Tribe alleges in its memorandum in support of its motion for preliminary injunction, that the Tribe has a direct monetary stake in Westmoreland's current coal severance tax payments to Montana. Such claim is wrong, or speculative, or at least not proved. First, the Tribe does not pay any of the severance tax to the State of Montana. Secondly, there is no factual evidence in the record in this case, concerning what part, if any, of the coal in the ceded strip, including that being leased by Westmoreland, is property of the Tribe. The Tribe claims in its memorandum, that the Tribe owns the mineral underlying the ceded strip, and gives as authority for that allegation, the Court's decisions in *Cade v. Morton*, 527 F.2d 786, 789 (9th Circuit 1975), and the 9th Circuit's decision in this case, *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1107, 1114, n 16 (9th Cir. 1981). However, the actual issue of ownership of the coal was never litigated in *Cady v. Morton*, or in this case, *Crow Tribe v. State of Montana*. In fact, there has been no evidence of actual ownership of the coal presented by the Tribe in this case. On the other hand, there is reason to believe that at least a sizeable portion of the coal in the ceded strip is not held in trust for the Tribe. In the summer of 1981, a law student, Robert Snively, conducted a study with regard to the ownership of coal under the ceded strip. This paper, entitled "Mineral Ownership On the Crow Ceded Strip", January, 1982, which is part of Robert Snively affidavit, shows that the Tribe has a mineral interest in only approximately 8% of the total acreage in the Ceded Strip,

which 8% is not concentrated in the Westmoreland mine here involved.

There is also no evidence in the record, that the Tribe's tax has been approved by the Secretary of the Interior, and would therefore be effective and applicable to Westmoreland's operation on the ceded strip, were it not for the State of Montana's severance tax. Therefore, there is no evidence, that the Tribe is entitled to any refund, or is entitled to any of the Montana Severance Tax payment, which Westmoreland is scheduled to make in January, 1983. As the 9th Circuit noted in this case, "as to taxes already paid by Westmoreland, however, it is true that the Tribe doesn't pay any of the taxes and it is apparently not entitled to any refund if the tax statutes are declared invalid." 650 F.2d 1104, n 13.

Not only is there no evidence that the Tribe has any actual monetary stake in the severance taxes paid by Westmoreland to date or scheduled to be paid in January of 1983 by Westmoreland, but there is also no conclusive evidence that the Montana Severance Tax does or will violate any federal statute or rights and interests of the Tribe, now or in the future. As we have argued in Part B above, the decision of the 9th Circuit merely remanded the case to this Court for further hearing and factual determinations. As we have noted, the Tribe quotes certain portions of the 9th Circuit's decision, which they argue establishes the likelihood of the Tribe's prevailing in this case, and establishes the Tribe's interest in Westmoreland's severance tax payments to the State. However, as we have pointed out, it first is possible that the 9th Circuit's decision was premised on an erronous assumption regarding coal ownership, and second, the

decision of the 9th Circuit was nothing more than a remand for factual determinations and only recognizes possibilities that the State's tax may conflict with rights or interests of the Tribe.

In summary, the Tribe has established no real actual injury in order to have standing to seek a preliminary injunction, or deposit of Westmoreland's taxes. As noted, ordinarily a party has no standing to assert the rights of third persons. *Arlington Heights v. Metropolitan Housing Development Corp.*, (1977) 429 U.S. 252, 50 L.Ed2d 450, 97 S.Ct. 555. The Tribe's motion for a preliminary injunction asks the Court to enjoin the State from enforcing or collecting the Montana coal severance tax now being paid by Westmoreland to the extent that the tax is imposed on coal held in trust for the Tribe. There is no supporting factual evidence in the record showing what coal, if any, is held in trust for the Tribe in the ceded strip. The Tribe may have standing to seek a declaratory judgment to determine whether the Montana severance tax conflicts with any Federal statutes or interests of the Tribe based upon a factual record as solicited on remand by its 9th Circuit in this case, but clearly it should not be allowed injunctive relief to interrupt a tax paid by a third person, Westmoreland, when the Tribe has not established that it has any monetary interests in the severance tax scheduled to be paid by Westmoreland to the State of Montana in January, 1983.

D. RULE 67 DEPOSIT:

Federal Rule of Civil Procedure 67 provides:

"In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C. §§2041, and 2042; the Act of June 26, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, §725v; or any like statute."

1. Deposit of Funds pursuant to Rule 67 is not a common practice.

Deposit of funds pursuant to Rule 67 is not a common practice as suggested by the Tribe and Westmoreland. There are not very many occassions when the Rule 67 process is applicable. *Wright and Miller, Federal Practice and Procedure:Civil*, §2991.

2. A prerequisite for allowing deposit under Rule 67, is that there be an absense of dispute regarding the depositor's liability for the amount to be deposited.

It follows that the depositor's liability to pay the total sum to someone must be undisputed. Thus where a party clings to its affirmative defenses, or does not completely concede that the full amount of taxes deposited is owed

to someone, the court will not grant leave to deposit funds with the Court. *Fed. Proc., L Ed* §24.3 – 24.5.

It is not clear from the record here, in what amount, if any, Westmoreland and the Tribe believe is undisputably owed to the State or to the Tribe. It is not clear whether Westmoreland irrevocably concedes that the Tribe has a right to tax Westmoreland in the same amount of the state's tax, despite representations that Westmoreland has reached agreement with the Tribe regarding taxes. And secondly, even if Westmoreland and the Tribe do agree that the Tribe has such right to tax Westmoreland, the effective date and the amount of such tax is also unclear. These uncertainties, which are explained below, make a Rule 67 deposit inappropriate in this case.

When the Crow Tribe and Westmoreland first entered into their agreement in 1972, no provision was made for a Crow severance tax. And there is no evidence in the record in this case that the Crow severance tax, enacted in January 1976, has been approved by the Secretary of the Interior with regard to the "Ceded Strip", and thus there is uncertainty if and when the Crow tax may be applicable to Westmoreland. Further, it is not entirely clear from the Tribe and Westmoreland's "amended coal mine lease of Indian lands", dated July 10, 1982, whether Westmoreland has unequivocally conceded that the Tribe can tax Westmoreland in the same amount as the State of Montana, should the Montana Severance Tax be found to be inapplicable to Westmoreland. For example, on page 2, paragraph 3, of the Tribe and Westmoreland's amendment of July 10, 1982, it states that "in the event the Montana Severance Tax is repealed or reduced the Crow severance tax is subject to renegotiation", and it further

states, in paragraph 5 and 6 on page 3 of the amended lease that this agreement between Westmoreland and the Tribe, "is not an admission by Westmoreland or the Tribe that the Tribe does in fact have the power to impose a tax on Westmoreland". Finally, the record here shows that Westmoreland has filed a crossclaim against the Tribe in this case, challenging the Tribe's right to tax, which cross-claim is still pending before this Court. The existence of this crossclaim indicates that Westmoreland does not agree that the Tribe's severance tax is totally applicable upon coal mined by Westmoreland, should the Montana Tax be found inapplicable. The original complaint and second amended complaint, which the Tribe filed, was not for a specific sum of money. The Tribe's third amended complaint has not yet been answered by the State but the State here denies and will deny that there is any basis for the Tribe seeking any refund or monetary award in this case. In summary, the prerequisite under F.R. Civ. P. 67 that the amount sought to be deposited must be certain and not disputed, is clearly not met in this case. Based on the record, or lack of record, before this Court, a deposit with the Court in this case is inappropriate.

On page 6 of its Memorandum in support of its motion to deposit funds, the Tribe's counsel argues that under the 9th Circuit's decision, the Tribe has demonstrated that the Tribe is likely to succeed on the merits. The Tribe claims there is a substantial likelihood that the State will be unjustly and unlawfully enriched at the expense of the Tribe and/or Westmoreland. The State strenuously disagrees with this argument advanced by the Tribe's counsel. The State does not view the 9th

Circuit decision as anything more than a remand for fact finding. As noted above in this memorandum there are statements in that decision which can be interpreted to support either party's argument that they will prevail on the merits. The fact finding solicited by the 9th Circuit's decision in this case, supports the proposition that the record is inadequate and that it is thus impossible to speculate, at this time, who will prevail in this case or how and to whom the taxes here involved will be allocated.

In any event, even if the State were to lose this case, in whole or in part, there is no question that the State is solvent and will remain a governmental entity and that the State is good for any proper judgment that may be rendered against it as a result of this litigation. Therefore, a Rule 67 deposit with the Court in this case is inappropriate.

On page 7 and 8 of the Tribe's and Westmoreland's Memorandum in support of its motion to deposit funds, it makes reference to *Conoco Inc. v. Shoshone and Araphaho* [sic] *Tribes et al.*, No. C80-181B, and *Amoco Production Company v. Robert N. Harris, et al*, C80-0208B. These cases are clearly distinguishable from this case. In the *Conoco* and *Amoco* cases, *supra*, a Tribal severance tax was involved. It is easy to understand that the oil companies would agree to a deposit of the funds, rather than pay such taxes to the Tribes. But in this case a State severance tax is involved. There may be no statutes expressing a public or Indian policy against escrowing Tribal taxes but as noted there are statutes such as the Federal anti-injunction statute, 28 U.S.C. §1341 or the Montana anti-

escrow statute, §15-1-402(7) M.C.A., which express a policy of not escrowing taxes to be paid directly to and distributed by a State. If the State and Westmoreland also want Westmoreland to pay any Crow Tribe severance tax into escrow as was done in the *Conoco* case, that may be more analogous to the *Conoco* case than having the State's tax escrowed.

The Tribe also cites the *Merrion v. Jicarilla Apache Tribe*, ___ U.S. ___, 102 S.Ct 894, 71 L.Ed2d 21 (1982) and *Ramah-Navajo School Board v. Mexico Bureau of Revenue*, ___ U.S. ___, 102 S.Ct. 3394, 73 L.Ed2d 1174 (1982) in support of its motion to deposit funds. However, both the *Merrion* and *Ramah-Navajo* cases, can also be distinguished from this case. In the first place, it is not clear from the Tribe's memorandum, how these cases support a motion to deposit funds, since it does not appear that there are any funds escrowed in those cases. Secondly, the facts in *Merrion* and *Ramah-Navajo*, are different from the case here, and therefore are not conclusive on the merits of the issues in this case. In *Merrion* the pertinent issue was the Tribe's authority to impose an occupation tax on oil and gas produced from Tribal land within the Reservation. Similarily the *Ramah-Navajo* case involved a State tax on a non-Indian company doing business on the Indian Reservation. In this case the ceded strip is not part of the reservation. *Little Light v. Crist*, 649 F.2d 683 (9th Cir. 1981). More importantly, in this case, as explained elsewhere in this Memorandum, it is unclear if and to what extent, the coal underlying the "Ceded Strip" is held in trust for the Tribe and for that reason alone the connection between the Crow Tribe and the coal under the "Ceded Strip" is more speculative and tangential than the

case of a company doing business on an Indian Reservation as in *Ramah-Navajo*, or a Tribal severance tax on oil and gas produced on an Indian Reservation as in *Merrion*. As noted above it is impossible to speculate regarding the outcome of this case until a record is developed as solicited in the remand of the 9th Circuit. In any event, the *Merrion* and *Ramah-Navajo* cases are not a persuasive basis for a deposit of the Montana Severance Tax pursuant to Rule 67.

Finally, with regard to the Tribe and Westmoreland's motion to deposit funds, the claim by the Tribe and Westmoreland that the deposit of funds with the Court is common practice, is not true. *Wright and Miller, Federal Practice and Procedure: Civil*, §2991. This is particularly the case when a State's tax is involved as the disputed funds, since there are Federal and State policies and statutory reasons why such disputed funds should not be deposited. For example, as noted above, the Federal tax injunction statute, 28 U.S.C. §1341, is based on a long standing policy to prohibit Federal interference with State taxes and clearly bars Westmoreland from seeking relief to "enjoin, suspend, or restrain" State taxes under their Rule 67 motion. Even if the Tribe can successfully argue that they fall within one of the limited exceptions to §1341, there remains. the public policy as enunciated in §1341, to have Federal District Courts take a hands-off policy with regard to interfering in the tax collection and disbursement activities of the various States. Also, the Montana Legislature, in 1979, expressed public policy that taxes paid directly to the State of Montana should not be escrowed and that the taxpayer has a remedy to sue in

State Court and seek a refund. Section 15-1-402(7), provides in part, "the provision creating the special protest fund does not apply to any payments made under protest directly to the State".

In summary, the reasons to deny a deposit of State taxes pursuant to Rule 67 far outseigh [sic] any arguments in support of such deposit.

E. INJUNCTIVE RELIEF.

1. Injunctive Relief is designed to protect Status Quo.

As a preface to this discussion in Part E of this Memorandum regarding injunctive relief, it should be noted that many of the State's arguments and facts in Parts B, C and D above of this Memorandum – regarding jurisdiction under Section 28 U.S.C. 1341, standing, and deposit under Rule 67 – are relevant to the Court's determination on the motion for a preliminary injunction. Even if the Tribe can (1) clear the first hurdle and establish jurisdiction under Section 1341 for purposes of anticipatory injunctive relief prohibiting the State from enforcement against Westmoreland a non-Indian party, or (2) clear the second hurdle and establish standing of the Tribe for purposes of injunctive relief, or (3) clear the third hurdle and establish the appropriateness of a deposit under Rule 67 – in no way can the Tribe meet the standard tests for a preliminary injunction.

First, it should be pointed out that the grant or denial of injunctive relief rests within the sound discretion of the

Trial Court. The U.S. Supreme Court has recently reaffirmed that District Courts have discretion in applying their equitable jurisdiction on requests for injunctive relief even where there are alleged violations of law. *Weinberger v. Romero-Barcelo*, ___ U.S., 50 L.W. 4434 (April 27, 1982). Second, the Tribe and Westmoreland have the burden of proof to show that they are entitled to some form of injunctive relief. Third, the overriding purpose of injunctive relief is to maintain the status quo pending trial on the merits. The 9th Circuit has been especially insistent upon this. *See*, e.g., *Miss Universe, Inc., v. Flesher*, 605 F.2d 1130 (9th Cir. 1979); *Burton v. Matanuska Valley Lines*, 244 F.2d 647, 650 (9th Cir. 1956). The status quo in this case is that for over seven years, the State has been collecting the taxes challenged here, and which the Supreme Court upheld in *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981). There is no factual evidence in the record before this Court, that Montana's severance taxes conflict with any Federal statutes or rights of the Tribe. Even if the Tribe's interpretation of the 9th Circuit decision in this case is correct, in that it established a probable conflict between the Montana severance tax and the rights of the Tribe, (to which interpretation the State strenuously disagrees), there is still no showing in the record before this Court that the Tribe is entitled to a refund or any part of the Montana severance tax or a severance tax from Westmoreland. Injunctive relief would merely interrupt the status quo of the lawful and orderly collection and disbursement of the Montana coal severance tax here in question. As noted above, the effect of the request to deposit funds with the Court, has the same effect as injunctive relief, and would also disrupt the

status quo with regard to the orderly collection and disbursement of the Montana severance tax. Injunctive relief would not preserve the status quo but would merely interrupt the status quo.

2. Standards considered on motion for preliminary injunction.

The four requirements for a preliminary injunction have been set forth previously by this Court as follows:

> (1) A reasonable probability of success on the merits;
>
> (2) Irreparable injury for which there is no adequate legal remedy.
>
> (3) Others will not suffer serious adverse effects as a consequence of the preliminary injunction;
>
> (4) . . . The effect of the requested order on the public interest.

Kelly v. Gilbert, 437 F.Supp. 210, 204 (D. Mont. 1976).

In addition to these four criteria, the 9th Circuit recognizes an alternative test for granting of a preliminary injunction which involves a balancing of hardships:

> "One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibilities of irreparable injury or serious questions are raised and the balance of hardships tip sharply in his favor."

William Einglish & Sons Baking Co. v. ITT, 526 F.2d 86, 88 (9th Cir. 1975).

This alternative test is not, however, a test entirely unrelated to the first test enunciated in *Kelly v. Gilbert, supra*, because the two tests are "merely extremes of a single continuum", *Benda v. Grand Lodge Of International Association*, 584 F.2d 308, 315 (9th Cir. 1978), with the plaintiff's hardships given more weight at one end and the plaintiff's likelihood of success given greater weight at the other end.

In applying these tests to the case here, it is clear that the Tribe and Westmoreland do not meet their requirements of either test.

3. Likelihood of success on the merits.

As the State has pointed out throughout this Memorandum, the Tribe and Westmoreland have simply not supported their allegations in their Complaints or their Motions for Injunctive Relief, with any factual evidence. Rather the Tribe and Westmoreland rely primarily on dicta from the decision of the 9th Circuit in this case. As we have shown, the decision of the 9th Circuit in this case does not demonstrate a probability that the Tribe will succeed on the merits. While the Tribe quotes certain statements of the 9th Circuit in this case, to support their allegations, as we have noted, there are also statements in the dicta of the 9th Circuit, (*See*, pages 11-12 of this Memorandum, *supra*) which would allow this Court to rule in favor of the State, after a factual record is developed before this Court. This case was before the 9th Circuit on appeal for a request for declaratory and injunctive relief, and if the 9th Circuit clearly believed that the Tribe were likely to succeed on the merits, it could have

fashioned its remand in a manner which would have had the effect of enjoining or escrowing the funds hereinvolved [sic].

And, on the other hand, the State has shown that there are threshold questions in this case, such as ownership of the coal, and effectiveness of the Tribe's severance tax, which threshhold questions raise serious doubt that the Tribe and Westmoreland will prevail on the merits in this case.

4. Irreparable injury to the Tribe and Westmoreland.

The Tribe and Westmoreland have not demonstrated that they will suffer irreparable injury, if they are denied any form of injunctive relief. As noted above, Westmoreland has other State remedies, which would allow it to sue in State Court and seek a refund if Westmoreland believes that the Montana Severance Tax is unlawful as applied to its mining operation on the ceded strip.

And, as noted above in Part B of this Memorandum, first, there is doubt whether the Tribe has a litigious interest under 28 U.S.C. 1362, which would be the basis for an exception to 28 U.S.C. §1341. As noted above, in Part C of this Memorandum, the Tribe has no proven direct injury for purposes of standing to seek injunctive relief to prevent the State from proceeding against Westmoreland, because the Tribe has not demonstrated that it is entitled to any refund, or money from Westmoreland, were it not for the Montana severance tax. The Tribe may have standing and the Tribe's Complaint may state a cause of action in order to raise its constitutional and

statutory issues concerning its rights and the Montana severance tax, for purposes of a trial with development of a record for a decision on those issues, but it has not shown that it has suffered monetary harm to date, nor would it suffer monetary harm if Westmoreland makes the Montana severance tax payment due in January, 1983. Therefore the Tribe has not shown any irreparable injury if the relief it seeks here is denied. There is no evidence in the record to show what part, if any, of the mineral underlying the Westmoreland resources actually belongs to the Tribe, and there is no evidence to show that the Tribe's severance tax would be in effect on the ceded strip and applicable to Westmoreland were it not for the State's severance tax. There is evidence, based on the fact that Westmoreland has filed a counterclaim against the Tribe challenging the Tribe's right to tax Westmoreland, that the Tribe may not receive any money, even if the Montana tax were not in existence.

Even if it is determined by a proper authority, now or later that the Tribe is entitled to part of Westmoreland's State severance tax, such money is recorded, traceable and refundable by the State, as pointed out in the affidavit of David M. Lewis.

Therefore, the Tribe has simply not shown that it will suffer irreparable harm if injunctive relief is denied.

5. Irreparable injury to the State.

As noted in the attached Affidavit of David M. Lewis, Director of the office of Budget and Program Planning of the State of Montana, the relief sought by the Tribe and Westmoreland to deposit the funds and enjoin the State

from collecting and enforcing the Montana severance tax, would disrupt the orderly collection and disbursement of the Montana severance tax. Because Westmoreland would continue its mining operations here in question, there would be impacts from the mining operation, and Westmoreland's contribution to mitigate those impacts would be impounded. For example, money from the Montana severance tax goes for the benefit of law enforcement, schools, and road construction and maintenance, in areas including the area of Westmoreland's mining operation and it is unfair and injurious to the State to allow Westmoreland to continue mining with its attendant impacts, while at the same time impounding the taxes intended to address such impacts.

6. Public interest.

As noted above, there are both Federal and State statutes, which have been interpreted by the Courts, to reflect the public interest and preference of restricting Federal Courts from issuing any type of injunctive relief or interfering with the payment or disbursement of State taxes. (§15-1-402(7); and 28 U.S.C. §1341.) In this case the public interest will be served by denying the deposit of funds and injunctive relief. The Tribe and Westmoreland have demonstrated no public interest to be served by depositing the funds or issuing a preliminary injunction. On the other hand, as pointed out in the Affidavit of David M. Lewis, the public would suffer if the funds are escrowed or a preliminary injunction is issued.

7. Alternative tests involving balance of hardships.

The Tribe and Westmoreland have not met their burden of proof with actual factual evidence to show that they meet the alternative test of a preliminary injunction, involving balancing of the hardships. The Tribe and Westmoreland have not shown that the denial of injunctive type relief, including deposit of funds, would deprive them of a remedy should they succeed on the merits in this case. As noted above, the Tribe has not demonstrated that it is entitled to any of the Montana severance tax which Westmoreland will pay in January of 1983, and even if they could show they are entitled, they have not shown that they would not be able to remedy such injury. Westmoreland has another remedy, to sue in State Court, and seek a refund. The balance of the hardships go against the Tribe and Westmoreland in their request for injunctive type relief, because they have not shown any immediate injury resulting from Westmoreland's tax payment to the State on or prior to January 1983. The state has shown that even if the Tribe and Westmoreland succeed on the merits, the Tribe and Westmoreland have a remedy, because the severance tax payments here are recorded traceable, and refundable, from a solvent and dependable entity, the State of Montana, if such refund is authorized by a proper judgment by any court with proper jurisdiction and authority. On the other hand, the State has shown that injunctive type relief, or deposit of funds, could likely cause greater mischief than denial of such relief to the Tribe and Westmoreland, as pointed out in the affidavit of David M. Lewis. Any injunctive type relief before there is any development of a factual record in this case, may only serve to complicate the litigation,

and cause an interference with and hardship to the State of Montana and the public generally. If Westmoreland is allowed to continue its mining operations, without the State collecting and dispersing the severance tax designed to mitigate impacts from such mining, the public will suffer. If the funds are escrowed, on one, the State, the public or the Tribe receives the use or benefit of those funds while they are escrowed.

In summary, the Tribe and Westmoreland fair [sic] no better in meeting the alternative test for any injunctive type relief than they do in meeting the requirements enunciated in *Kelly v. Gilbert*, 437 F.Supp. 201, 204 (D. Mont. 1976). The arguments of the Tribe and Westmoreland in support of their motions here are based primarily on their verified Complaint and brief affidavits, and as indicated, the State intends and will have filed a verified Answer denying the allegations of the Tribe. Courts have held that where a party seeks injunctive type relief relying primarily on verified complaints and affidavits, which are denied by a verified answer and affidavits and there is no other evidence introduced the exercise of discretion normally calls for denial of injunctive type relief.

In conclusion, the Tribe and Westmoreland have clearly not met their burden of proof and clearly this is not a case for any type of injunctive relief.

Respectfully submitted this 13th day of December, 1982.

ANDERSON, BROWN, GERBASE,
CEBULL & JONES, P.C.

BY: /s/ John W. Ross
JOHN W. ROSS
JEROME ANDERSON
P.O. Drawer 849
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al., Plaintiffs,	)	No. CV-78-110-BLG
-v-	)	
THE STATE OF MONTANA, et al., Defendants.	)	

AFFIDAVIT

David M. Lewis, being first duly sworn, deposes as follows:

1. That I am the Director of the Office of Budget and Program Planning of the State of Montana, duly appointed by the Governor.

2. That my duties as Director of the Office of Budget and Program Planning include preparation of the Governor's Executive Budget Request for presentation to the Legislature.

3. That I have been informed that the plaintiffs have requested the Court to escrow future coal severance tax payments from the Westmorland Mine, and that this would result in the funds being unavailable to the State during the pendency of this litigation.

4. That the plainitff's [sic] request, if granted would impede the State's budgeting and planning efforts at least during the period the funds would be held in escrow;

5. That there is a State policy, as evidenced by section 15-1-402, MCA, that taxes owed to the State and taxes paid in protest not be placed into an escrow account or protest fund.

6. That if the coal severance tax funds collected from the Westmorland Mine are not available to the State, the impacts of that mine and the concurrent needs of the area will nonetheless continue without a continuing source of funding to alleviate those impacts. Substantial portions of the money collected from the Westmoreland Mine are specifically allocated for local impacts such as schools and highway improvement. *See* section 15-35-108, MCA.

7. That even if the escrowed taxes were placed in an interest bearing account, there is no perceivable way that the State and its affected citizens could be made whole for the losses the State and its citizens would sustain because of the unavailability of the funds for the uses

contemplated by section 15-35-108, MCA. Such uses include, but are not limited to, construction and/or expansion of school facilities, additions to and maintenance of highway facilities, augmentation of law enforcement staffs and facilities as determined to be necessary by appropriate boards and commissions, loss of funding in the area of development of alternative energy sources, and loss of funding for State equalization aid in the public schools of the State of Montana.

If the monies are not available during the pendency of this proceeding for the uses contemplated by section 15-35-108, MCA, the State and its citizens will be deprived of the facilities which could be provided through the use of the funds and thus would suffer great inconvenience and hardship during that period of time. Inflationary increases in the cost of providing the facilities contemplated by section 15-35-108, MCA, are certain to cause substantial increases in such future costs, which increases cannot be set off by income gained by the funds while they are sequested in the subject interest bearing account.

The members of the plaintiff Crow Tribe as well as the citizen domiciled in Big Horn and surrounding counties participate in certain uses of the funds as provided in section 15-35-108, MCA, and thus benefit from the continued collection and availability of the funds for public purposes. Thus, not only would the public interest of citizens of Montana domiciled off the reservation be deliterously affected by the unavailability of the funds, but the plaintiff tribe itself would be adversely affected by a cessation of the collection and uses of the funds by the State of Montana. This is particularly true because no

one, including the tribe, would have access to the funds during the pendency of this action should the State be enjoined from collecting the funds and should the funds be sequestered into a court administered account as contemplated by the pending motions.

8. That an accounting of monies paid by Westmoreland to the State of Montana is maintained by the State Department of Revenue so that the amounts of such payments can be determined from time to time. It is unnecessary to order the escrow of any funds paid by Westmoreland to the State because the State is fully capable of meeting any obligations which might ultimately arise as the result of any proper judgment, order or decree issued by any court with proper jurisdiction and authority as the result of this litgation.

FURTHER AFFIANT SAYETH NOT.

DATED this 8th day of December, 1982.

/s/ David M. Lewis
DAVID M. LEWIS, Director
Office of Budget and
Program Planning

STATE OF MONTANA)
: ss
County of Lewis and Clark)

First being duly sworn, the above, David M. Lewis, personally appeared before me, who, upon oath, swore that he has read the foregoing affidavit and that the

statements therein are true to the best of his knowledge and belief.

SUBSCRIBED AND SWORN to before me this 8th day of December, 1982.

/s/ Irma Paul
Notary Public for the
State of Montana.
Residing at Helena, Mt.
My Commission expires 1-11-83.

Daniel H. Israel
George J. Miller
Dechert Price & Rhoads
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Attorneys for Intervenor Defendant
Westmoreland Resources, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, v. THE STATE OF MONTANA, et al., Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	)	Civil Action No. CV-78-110-Blg

ANSWER OF INTERVENOR DEFENDANT WESTMORELAND RESOURCES, INC. TO PLAINTIFF'S THIRD AMENDED COMPLAINT, INCLUDING COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFF, AND CROSS-CLAIM FOR DECLARATORY RELIEF AGAINST DEFENDANTS

Westmoreland Resources, Inc. ("Westmoreland") answers plaintiff's Third Amended Complaint as follows:

1. Admitted that this Court has jurisdiction over this controversy and that venue is proper.

2.-13. Admitted as to statements of fact. To the extent that plaintiff avers conclusions of law, no answer is required.

14.-15. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 14 and 15.

16.-17. Admitted.

18. Admitted, except that the $54,000,000 figure should be $47,436,000, and the $7,000,000 figure represents gross proceeds taxes paid from operations on all Westmoreland leases in the ceded strip.

19. Admitted, except that Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the numbers contained in paragraph 19.

20. Admitted, except that Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averment that the unemployment rate of tribal members is much higher than among the non-Indian populations of Montana and adjacent states.

21. Denied as stated. Westmoreland admits that the existing lease between it and the Tribe requires it to pay a tax to the Tribe in amounts equal to the applicable Montana tax with a tax credit for whatever amount it is required to pay to the State. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments as they relate to the Shell lease.

22. Admitted that the taxes are a direct and major cost associated with the production of Crow coal. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the other averments in paragraph 22.

23. Admitted that the consequences of these taxes have been to drastically increase costs to purchasers of Crow coal, to severely restrict the royalty payments which Westmoreland has been willing to pay to the Tribe, and to discourage Westmoreland from renegotiating its lease with the Tribe. Admitted the second sentence of averment 23. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of those averments in paragraph 23 which relate to other lessees of the Tribe.

24.-26. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 24-26.

27.-28. Admitted as to statements of fact. To the extent plaintiff avers conclusions of law, no answer is required.

29.-33. As to statements of fact, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 29-33, except that it is admitted [in paragraph 31] that Montana's taxes on coal production are significantly greater than comparable taxes imposed by other states. To the extent plaintiff avers conclusions of law no answer is required.

34. Admitted, but Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averment that the Crow Tribe has enacted a gross proceeds tax.

35. Admitted that the Crow Tribe and Westmoreland have amended their coal mining lease and that the Amendment was approved by the BIA on September 29, 1982. Denied that Westmoreland has recognized the right of the Crow Tribe to impose taxes on the ceded strip. Rather, by the Amendment, Westmoreland agreed to pay the Crow Tribe severance and gross proceed taxes (of an amount comparable to that imposed by Montana and its subdivisions) less all severance and gross proceed taxes actually paid to Montana and its subdivisions. The Amendment specifically provides that Westmoreland does not admit [through the act of signing the Amendment] that the Crow Tribe has the power to tax on the ceded strip, and further the Amendment provides that under certain circumstances Westmoreland and the Crow Tribe are free to litigate the power of the Tribe to tax Westmoreland, as if the Amendment never existed.

36.-41. As to statements of fact, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 36-41. To the extent plaintiff avers conclusions of law no answer is required.

42.-43. As to statements of fact, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 42-43. To the extent plaintiff avers conclusions of law no answer is required. Should the Court determine

that the Crow Tribe is either entitled to a refund of severance and gross proceed taxes or restitution of illegally collected tax funds, Westmoreland and its customers are entitled to all or substantially all of the severance and gross proceed taxes which have been paid to Montana from production on the ceded strip.

44. Admitted.

45.-46. As to statements of fact, Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 45-46. To the extent plaintiff avers conclusions of law no answer is required. Should the Court determine that the Crow Tribe is either entitled to a constructive trust or the value of wrongfully converted property, both measured by the severance and gross proceeds taxes collected by Montana, Westmoreland and its customers are entitled to all or substantially all of the severance and gross proceed taxes which have been paid to Montana from production on the ceded strip.

47. Westmoreland is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 47.

COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFF

1. The allegations of paragraphs 1 through 47 of plaintiff's Third Amended Complaint and the answers thereto of intervenor defendant Westmoreland Resources, Inc. ("Westmoreland"), are incorporated herein by reference.

2. Westmoreland has a vital interest, as lessee of ceded area lands and mineral rights and as a company mining coal on the ceded strip, in the authority of the Tribe and Montana to impose taxes upon it.

3. Should the Court determine that the Crow Tribe is entitled to all or part of the severance and gross proceeds taxes which Westmoreland has paid and continues to pay to Montana, Westmoreland claims that it and its utility customers are entitled to all or substantially all of such unlawfully paid taxes up until September 29, 1982, the effective date of the Amended Lease.

4. Westmoreland has no adequate remedy at law. WHEREFORE, Westmoreland requests this Court: (a) To grant Westmoreland all or substantially all of the Montana severance and gross proceeds taxes which the Court finds, on the basis of the claims of the Crow Tribe in this action, have been unlawfully imposed and collected by Montana; and

(b) To grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

CROSS-CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST DEFENDANTS

1. The allegations of paragraphs 1 through 47 of plaintiff's Third Amended Complaint and the answers thereto of intervenor defendant Westmoreland Resources, Inc. are incorporated herein by reference.

2. Westmoreland has a vital interest, as lessee of ceded area lands and mineral rights and as a company

mining coal on the ceded area, in the authority of the Tribe and Montana to impose taxes upon it.

3. Should the Court determine that the Crow Tribe is entitled to all or a part of the severance and gross proceeds taxes which Westmoreland has paid and continues to pay to Montana, Westmoreland claims that it and its utility customers are entitled to all or substantially all of such unlawfully paid taxes up until September 29, 1982, the effective date of the Amended Lease.

4. Westmoreland has no adequate remedy at law and is suffering irreparable harm.

WHEREFORE, Westmoreland requests the Court: (a) To grant Westmoreland all or substantially all of the Montana severance and gross proceeds taxes which the Court finds, on the basis of the claims of the Crow Tribe in this action, have been unlawfully imposed and collected by Montana; and

(b) To grant Westmoreland its costs and attorneys' fees in this action, together with such other and further relief as the Court deems necessary, proper and just.

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Dated: December 20, 1982

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of December, 1982, I mailed a true and correct copy of the above ANSWER OF INTERVENOR DEFENDANT WESTMORELAND RESOURCES, INC. TO PLAINTIFF'S THIRD AMENDED COMPLAINT, INCLUDING COUNTERCLAIM FOR DECLARATORY RELIEF AGAINST PLAINTIFF, AND CROSS-CLAIM FOR DECLARATORY RELIEF AGAINST DEFENDANTS, postage prepaid for first class delivery by United States mail, addressed to the following:

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